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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

LARRY RISK, et. al.,
Petitioners,

VS.

THE KINGDOM OF NORWAY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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ON BEHALF OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

When, in passing the Foreign Sovereign Immunities Act (28 U.S.C. § 1605), Congress expanded the liability of foreign states for torts committed by their agents on American soil, did it nonetheless intend that felony offenses of such agents, if authorized by their governments, be considered "discretionary" within the meaning of 28 U.S.C. § 1605(a)(5)(A), thereby immunizing a foreign state from suit by a United States citizen who has suffered profound injury due to the crime of that foreign sovereign's agent?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
OPINION	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
REASONS FOR GRANTING THE WRIT	6
I.	
INTRODUCTION	6
II.	
AS WITH THE FEDERAL TORTS CLAIMS ACT, CONGRESS INTENDED FSIA TO PROVIDE REDRESS FOR INJURIES RESULTING FROM THE COMMISSION OF CRIMES BY AGENTS OF GOVERNMENTS	8
III.	
CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN INTERPRETATION OF FSIA CREATED BY THE OPINION BELOW AND TO DECIDE A QUESTION OF PARAMOUNT IMPORTANCE CONCERNING THE RESPECTIVE RIGHTS OF FOREIGN GOVERNMENTS AND AMERICAN CITIZENS	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases

Page

Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978) 10, 12

Cruickshank v. United States, 431 F.Supp. 1355 (D. Hawaii 1977) 10, 11

Gerritsen v. de la Madrid Hurtado, 819 F.2d 1151 (9th Cir. 1987) 11

Hathahley v. United States, 351 U.S. 173 (1956) .. 10, 12

Joseph v. Office of the Consulate General of Nigeria, 830 F.2d 1018 (9th Cir. 1987) 11

Letelier v. Republic of Chile, 488 F.Supp. 665 (D.C.D.C. 1980) 10, 11, 12, 13, 14

Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989) 11, 12

MacArthur Area Citizens Association v. Republic of Peru, 809 F.2d 918 (D.C. Cir. 1987) 10

Olsen by Sheldon v. Government of Mexico, 729 F.2d 641 (9th Cir. 1984) 9

Risk v. Kingdom of Norway, 707 F.Supp. 1159 (N.D. Cal. 1989) 2

Risk v. Kingdom of Norway, 936 F.2d 393 (9th Cir. 1991) 1, 3, 8, 12

Scheuer v. Rhodes, 416 U.S. 232 (1974) 3

Socialist Workers Party v. United States, 463 F.Supp. 515 (S.D.N.Y. 1978) 10

Statutes, Codes & Other Authorities

California Penal Code § 278.5 7

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1330 8

TABLE OF AUTHORITIES

STATUTES, CODES & OTHER AUTHORITIES

	Page
28 U.S.C. § 1332(a)(2)	8
28 U.S.C. § 1332(a)(4)	8
28 U.S.C. § 1391(f)	8
28 U.S.C. § 1441(d)	8
28 U.S.C. § 1602-1611	8
28 U.S.C. § 1605(a)	2, 8
28 U.S.C. § 1605(a)(5)	8, 9
28 U.S.C. § 1605(a)(5)(A)	8, 9, 14
28 U.S.C. § 1605(a)(5)(B)	i, 9
28 U.S.C. § 2680(a)	9
28 U.S.C. § 2680(b)	9
H.R. Rep. No. 94-187, 94th Cong. 2d sess. 7 (1976)	9
Pub.L. No. 94-583 90 Stat. 2891-92 (1976)	8
U.S. Code Cong. & Admin. News p. 6604 (1976)	9

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OPINION BELOW

The decision of the Ninth Circuit panel, rendered June 5, 1991, is reported officially at 936 F.2d 393; the text of that official report is contained in Appendix A to this petition. The final order denying rehearing, issued August 16, 1991, is unpublished and is found in Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit's opinion was filed on June 5, 1991. The petition is timely, rehearing having been denied by the Ninth Circuit on August 16, 1991. See Appendix at B; *see also* Sup.Ct.R. 20.4.

STATUTE INVOLVED

1. Foreign Sovereign Immunity Act (hereafter "FSIA"), 28 U.S.C § 1605(a):

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

* * *

(5) [I]n which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment; except that this paragraph shall not apply to —

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . .

STATEMENT OF THE CASE

In 1988 Larry Risk and his two children, Karima and Jamil Risk, filed suit against the government of Norway, two of its consular officials, a Norwegian corporation, and several Norwegian citizens, including Larry Risk's former wife, Elisabeth Antonsen Risk. (ER 1-2).[1] The suit alleged each of the defendants conspired with Elisabeth Risk, Karima's and Jamil's mother, to abduct the children from California to Norway in 1984, in violation of a California custody order requiring the children to remain in the Bay Area. (ER 1-16). The suit sought damages for torts resulting from the abduction and removal to Norway of the Risk children.

In an opinion reported at 707 F.Supp. 1159 (N.D. Cal. 1989), the District Court for the Northern District of California dismissed the government of Norway from the action. The court

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[1]ER refers to Appellant's Excerpt of Record, filed with the Ninth Circuit; SER refers to Appellee's Supplemental Excerpt of Record. CR refers to records contained in the district court docket.

held that it lacked subject matter jurisdiction over Norway as a result of the nation's sovereign immunity.[2] The Ninth Circuit affirmed the dismissal. 936 F.2d 393 (9th Cir. 1991).

STATEMENT OF FACTS

Larry Risk married Elisabeth Antonsen Risk in March 1977, in San Francisco.[3] Their children, Karima and Jamil, were born in San Francisco on October 21, 1977 and October 14, 1980. The couple maintained a residence in San Francisco during the length of the marriage. Each of the Risk children is an American citizen and has been issued an American passport. (ER 3).

In the summer of 1983, Larry Risk, a schoolteacher, took a sabbatical and traveled to Norway, with his wife, a Norwegian, and his children. After a few months, his wife experienced psychological problems and was hospitalized. After some time, Mr. Risk returned to the United States with his children, who spoke no Norwegian and had never before been to Norway.

In January of 1984, during a visit by Larry Risk and his children to his parents' home in Indiana, Elisabeth arrived and sued for custody of her children, raising as the basis of her claim a Norwegian custody decree obtained in the late 1983.

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[2]In the same opinion, the district court dismissed two Norwegian consular officials from the action on the basis of the Vienna Convention on Consular Relations (VCCR). Although that ruling was challenged and affirmed on appeal to the Ninth Circuit, it is not the subject of this petition. The VCCR, an international treaty, was intended to shield consular officials from suit; FSIA, on the other hand, was intended by Congress to make foreign states liable for torts committed by agents — e.g., diplomats — who are plainly immune from personal liability. Any immunity possessed by consular officials under the VCCR is thus quite irrelevant to the issue petitioner now brings before the Court.

[3]The facts below are taken from the complaint filed April 19, 1988. In reviewing the district court's decision to dismiss Norway for lack of subject matter jurisdiction, the Ninth Circuit was required to assume that the allegations in the complaint are true. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

On January 20, 1984, the issue of the validity of the 1983 Norway decree was adjudicated in the Marion Superior Court in Indiana before Judge Richard L. Milan (Action No. S484-0007). The court found, upon facts stipulated to by both Larry and Elisabeth Risk, that "the Norwegian decree was entered four months after the children came into the country of Norway, and that the Norwegian court thus had no jurisdiction under the Uniform Child Custody Act to enter a valid decree." Milan then transferred the case to San Francisco for further proceedings.

Defendant Elisabeth Antonsen Risk then filed a petition in the San Francisco Superior Court seeking custody of Jamil and Karima Risk. At a hearing on the petition held on January 27, 1984, the parties stipulated that the San Francisco Superior Court of the State of California was the proper court to decide the custody issue. (ER 4). Judge Isabella H. Grant of the San Francisco Superior Court awarded joint legal and physical custody of the Risk children to both parents. Physical custody was to alternate between Larry and Elisabeth Risk on a weekly basis. The court provided for the children to remain in the family home in San Francisco, their lifetime residence, while requiring the parents to occupy the house during alternating weeks of actual custody.

The court expressly prohibited either parent from removing the Risk children from San Francisco, Marin, Alameda, Contra Costa, San Mateo or Santa Clara counties without prior written consent of the other parent, or an order of the San Francisco Superior Court. The Risks' passports were surrendered to the control of the Superior Court as a condition of the decree. (ER 4-5).

Both Risk parents were prohibited from applying for or obtaining passports for their children, or from directing any other party to apply for or obtain passports on the children's behalf. The parties were warned that violation of any travel restriction imposed by the court would result in a grant of sole custody to the

non-offending parent. An order containing these provisions was issued on January 30, 1984. (ER 4-5).[4]

A week after the custody decree, Elisabeth Risk began an effort to circumvent its provisions. On February 9, 1984 she wrote to the Norwegian Foreign Ministry in Oslo, to inform the Ministry of the provisions of Judge Grant's order. The letter, which was delivered via the Norwegian Consulate General in San Francisco, also was forwarded to Norway's Justice Ministry. The Norwegian Government responded to the letter by providing Elisabeth Risk with money to cover her legal and living expenses. (ER 5-6).

During the pendency of the custody proceedings Elisabeth Risk resided at the Norwegian Seaman's Church in San Francisco. She contacted Johans Sandvin, personnel director of the Norwegian Seaman's Mission (an affiliate of the Church), and informed him of the custody proceeding and ultimately of the January 30, 1984 custody order, including the travel restrictions. Sandvin spoke with officials of the Norwegian Justice Ministry who told him they were aware of the conditions of the order, that the outcome of the custody matter would have been different in Norway, and that Elisabeth Risk's case in the United States was "hopeless." An official in the Justice Ministry informed Sandvin that the best approach to the problem was for Elisabeth and the children to travel to Norway. (ER 6).

Sandvin then contacted Olaf Solli, Norway's Consul General in San Francisco, who, after learning of the custody order's restrictions, suggested that Elisabeth circumvent them by travelling with the children to Norway via Canada. Sandvin then called the Consul General in Los Angeles, K.I. Halvorsen, who, after

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[4]Given Antonsen Risk's stipulation to the San Francisco court's jurisdiction, its decree is obviously valid. In any case, neither Norway nor Antonsen Risk could challenge the decree's validity in any federal action such as this one. While federal courts may entertain a suit for damages arising out of a violation of a state custody decree, they are barred by the "domestic relations" exception to federal jurisdiction from considering the underlying merits of that decree. See, e.g., *McIntyre v. McIntyre*, 771 F.2d 1316, 1317 (9th Cir. 1985). Such challenges must thus be brought in the courts of the state granting the custody order.

learning of the order's provisions, suggested that Elisabeth Risk and her children should be supplied with identification papers which would allow them to travel to Norway, despite their lack of passports, in violation of the decree. (ER 6-7).

On July 16, 1984, Elisabeth Antonsen Risk, Johans Sandvin, and the Risk children traveled to Los Angeles International Airport where they were met by K.I. Halvorsen. Halvorsen personally delivered a Norwegian Seaman's Certificate of Identity which contained an attestation by the Consul General that Elisabeth Antonsen Risk was a Norwegian subject. The Certificate was dated July 16, 1984, and included the first names and birth dates of the Risk children. The children's last names were falsely changed to Antonsen on the document. On that date, Antonsen Risk and the Risk children flew to Norway and have never returned. The Norwegian Ministry of Justice paid the travel costs of Antonsen's abduction of the children. (ER 7).

Larry Risk contacted Halvorsen after the children's disappearance, but the Consul General denied having been contacted by Elisabeth Antonsen Risk and asserted that he had never heard of her. (ER 8). In advising and assisting Elisabeth Antonsen Risk, both Solli and Halvorsen were fully aware of the provisions of the California custody decree and conspired with Mrs. Risk to violate the provisions of that decree. (CR 12).

After exhausting other avenues of relief, Larry Risk filed suit in response to the abduction of his children in blatant violation of the California custody order. His complaint alleged, *inter alia*, damages resulting from the effort by Norwegian officials, with Elisabeth Antonsen Risk, to violate the 1984 San Francisco Superior Court order.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The question raised in this petition has broad implications for the redress of criminal acts by agents of foreign governments in the United States. The crimes perpetrated by Norwegian agents in this case have robbed, perhaps permanently, a father of the love

of his children, and those children of that of their father. Larry Risk has not seen his children since their abduction.

Officials of the Norwegian Government, including members of its Justice Ministry, Foreign Ministry, and Consul Generals conspired with Elisabeth Antonsen Risk to violate a valid California custody decree in contravention of California Penal Code § 278.5.[5] Indeed, a criminal arrest warrant for Elisabeth Risk for her role in the affair remains outstanding. (CR 35 Exhibit B). Under California law a conspiracy to commit a felony child abduction constitutes both a separate felony (Cal. Pen. Code § 182) and an actionable tort. *Rosefield v. Rosefield*, 221 Cal.App.2d 431 (1963).

Norway was a key participant in the abduction of the Risk children. Its Justice Ministry counseled Elisabeth Risk to abduct the children. Knowing the passports of Elisabeth and the children had been surrendered to the California courts, the Norwegian Foreign Ministry provided false "seaman's papers" allowing her to travel to Norway. Norway's consular officials were participants in sheparding the Risk children out of the country, and the Norwegian government provided funds needed for the flight from California. Norway's agents acted at all times with full knowledge of the terms of the California custody order, and with the expressed intent of violating those terms.

In his suit, Mr. Risk seeks redress for the harm caused by Norway's criminal acts. The question for review in this Court is whether United States law provides a means for such redress. It would certainly seem likely that Congress, to the extent it

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[5]Penal Code § 278.5 states:

> (a) Every person who in violation of the physical custody or visitation provisions of a custody order, judgment, or decree takes, detains, conceals, or retains the child with the intent to deprive another person of his or her rights to physical custody or visitation shall be punished by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars ($10,000), or both; or by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

provided any redress for wrongs committed by foreign agents, would direct it first and foremost at victims of violations of the criminal laws of our state and federal governments. The Ninth Circuit panel, however, held relief is only available to victims of foreign agents when those agents have violated the laws of *their own foreign government.*[6] Under such a ruling, the scope of FSIA, a Congressional statute, and the redress it provides to American citizens vary from case to case, depending on the letter and spirit of the law of foreign nations: the more inhumane the law of a foreign nation, the more freedom its agents enjoy to commit crimes against humanity on United States soil. It is incumbent on this Court, the ultimate judicial authority of this nation, to decide whether Congress in fact crafted such a startling piece of legislation.

II.

AS WITH THE FEDERAL TORTS CLAIMS ACT, CONGRESS INTENDED FSIA TO PROVIDE REDRESS FOR INJURIES RESULTING FROM THE COMMISSION OF CRIMES BY AGENTS OF GOVERNMENTS

Larry Risk filed this action under provisions of the Foreign Sovereign Immunity Act, 28 U.S.C § 1605(a),[7] which permit plaintiffs to sue foreign governments for torts committed in the United States that result in personal injury or death. *Id.* § 1605(a)(5). FSIA excludes from the jurisdiction of United States courts claims which, although within the purview of § 1605(a)(5), are "based upon the exercise or performance or the failure to exercise or perform a *discretionary function* . . . . " *Id.* at § 1605(a)(5)(A) (emphasis added).

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[6]Conceding that, if proved, the Norwegian officials' actions were a crime in California, the panel denied liability because: "There is no assertion that the Norwegian officials violated any Norwegian law." 936 F.2d at 396.

[7]Pub.L. No. 94-583, 90 Stat. 2891-92, 2894-98 (1976), *codified at* 28 U.S.C. §§ 1330, 1332(a)(2),(4), 1391(f), 1441(d), 1602-1611.

The overriding purpose of the FSIA was to codify a movement in international law from absolute to "restrictive" immunity of foreign governments in the courts of a forum country. H.R. Rep. No. 94-187, 94th Cong., 2d sess. 7 (1976), *reprinted in U.S. Code Cong. & Admin. News p.6604, 6605* (1976) ("Under this principle, the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts . . . and does not extend to suits based on its commercial or private acts."); *see Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 645 (9th Cir. 1984).

The "Noncommercial torts" section, 28 U.S.C. 1605(a)(5), was part of this effort to restrict the application of sovereign immunity. The provision was

> directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages . . . . It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its employees . . . .

Id. at 6619. Its effect was to provide an avenue of redress to American citizens for the commission of torts by foreign governments.

The statute provided only two narrow exceptions to the general prohibition on using sovereign immunity as a defense to tort actions: the discretionary function exception, 28 U.S.C. §§ 1605(a)(5)(A); and an exception for claims arising out of malicious prosecution, abuse of process libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 1605(a)(5)(B). Indeed, only a single sentence in the house report is devoted to these exceptions: "The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act [hereafter "FTCA"], 28 U.S.C. § 2680(a) and (b)." *Id.* at 6620.[8]

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[8]Federal courts faced with FSIA disputes consistently have been guided by decisions construing the discretionary function analysis con-

Federal courts, in both the FSIA and FTCA contexts, have recognized that although criminal acts by a sovereign or its agents may involve a high degree of judgment, they fall outside the protection of the discretionary function exception. Although a sovereign may choose as a matter of policy to violate a criminal statute, it cannot be said to have exercised the kind of discretion intended to be protected by the exception.

So, for example, in *Cruickshank v. United States*, 431 F.Supp. 1355 (D. Hawaii 1977), plaintiff sued the United States for invasion of privacy after discovering the government had illegally tampered with his letters to the U.S.S.R. The district court held the discretionary function exception to the FTCA did not apply because the government was without discretion to commit a patently illegal act. *Id.* at 1358-59; *accord Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978) (illegal opening of mail by government agency not protected by the discretionary function exception); *Socialist Workers Party v. United States*, 463 F.Supp. 515, 526 (S.D.N.Y. 1978) ("A discretionary function can derive only from properly delegated authority. The function must be within the authority of an agency or official . . . ."). *See also Hathahley v. United States*, 351 U.S. 173, 181 (1956) (Illegal acts by government agents do not fall within the discretionary function exception.).

Not surprisingly, federal courts have relied on the foregoing cases to hold that illegal acts by *foreign* sovereigns fall outside the scope of the discretionary function exception contained in FSIA. In *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.C.D.C 1980), plaintiffs sued Chile under FSIA for torts connected with the assassination of a former Chilean ambassador and his assistant. The court rejected the argument that a decision to carry out this crime could escape FSIA jurisdiction because it was discretionary:

> While it seems apparent that a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly

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tained in the Federal Tort Claims Act. *See MacArthur Area Citizens Association v. Republic of Peru*, 809 F.2d 918, 921-22 (D.C. Cir. 1987).

> involving policy judgment and decision and thus exempt as a discretionary act under section 1605(a)(5)(A), that exception is not applicable to bar this suit. *As it has been recognized, there is no discretion to commit, or to have one's officers commit, an illegal act.*

Id. at 673 (citing *Cruikshank v. United States*, 431 F.Supp. 1355, 1359 (D.Hawaii 1977)) (emphasis supplied).

Similarly in *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), plaintiff filed suit pursuant to FSIA for torts connected with the assassination of her husband by agents of the Republic of China ("ROC"). Considering whether the discretionary function exception applied to the decision to carry out the killing, the Ninth Circuit found that ROC agents were without discretion to murder, noting that the crime was also a violation of ROC law. *Id.* at 1431; *see also Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1026-27 (9th Cir. 1987)(destruction of property not within the discretion of a sovereign); *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1518 (9th Cir. 1987) (not within the discretion of the Mexican government to commit assault, battery and other alleged torts on plaintiff).

As a group these cases, along with those decided in the FTCA context, agree that sovereigns cannot be permitted to hide behind the discretionary function exception when they commit serious crimes.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN INTERPRETATION OF FSIA CREATED BY THE OPINION BELOW AND TO DECIDE A QUESTION OF PARAMOUNT IMPORTANCE CONCERNING THE RESPECTIVE RIGHTS OF FOREIGN GOVERNMENTS AND AMERICAN CITIZENS

This Court should consider the issue presented in this case because the decision of the Ninth Circuit panel is squarely in conflict with the *Letelier* opinion, and conceptually in conflict

with FTCA cases decided by this Court (*Hathahley*), and by the Second Circuit (*Birnbaum*).

The panel rejected Risk's argument that because Norway's acts were criminal under California law, the discretionary function exception should not apply. 936 F.2d at 396-97. In distinguishing the two primary cases cited by Risk, *Liu* and *Letelier*, the Ninth Circuit panel created an unsettling rule regarding the permissibility of criminal conduct by agents of foreign sovereigns in the United States.

Liu and *Letelier* both held foreign governments liable under FSIA for the actions of their agents. The *Risk* panel, however, chose to read *Liu* in a manner at odds with *Letelier*:

> [In *Liu*, t]his court refused to apply the discretionary function exception to the FSIA. We held that because the acts in this (sic) case violated ROC law, they were not discretionary and thus fell outside coverage of the discretionary function exception. . . . [*Liu*] has no application to the facts here. *There is no assertion that the Norwegian officials violated any Norwegian law.*

Id. at 396. (emphasis added). The Circuit panel thus held that so long as an act plainly criminal under American law does not demonstrably violate the foreign sovereign's law, as it did in *Liu*, the discretionary function exception is applicable to that crime on United States soil. In the panel's view, Congress, in deliberately abrogating the rule that sovereigns are absolutely immune to tort suits in American courts, nonetheless intended to leave the power to define the scope of tort liability in the hands of foreign states.

If the Ninth Circuit's rule is correct, *Letelier* was wrongly decided. The plaintiff in that case would have been hard pressed to prove that General Pinochet or his henchmen lacked the power under Chilean law to order his security agents to murder opponents of his government living in the United States.[9] But *Letelier*, which rejected the notion that criminal activity is discretionary if

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[9]The panel's opinion in fact suggests that *Letelier* is based more on sentiment than clear thinking: "[T]he nature of the act in that case [murder] obviously influenced the court." 936 F.2d at 396-397.

approved by a foreign state, was not wrongly decided. The discretionary function exception correctly did not apply in that case because "there is no discretion to commit, or to have one's officers or agents commit, an illegal act." 488 F.Supp. at 673. The fact that a dictator signs a law giving himself power to assassinate his enemies logically should not affect tort liability under FSIA. This Court should grant certiorari to confirm *Letelier*'s proper reading of FSIA.

Furthermore, the potential consequences of the panel's ruling are ominous. Consider the following hypothetical: A Tienanmen Square dissident flees to this country, marries, and has a child with an American citizen. He continues his political criticism of the land he left. Under Chinese law, the child, plainly an American citizen, also is a citizen of China. A Chinese court finds that the parents are unsuitable and awards custody to their grandparents, still residents of China. At the grandparents' request, Chinese consular officials stationed in the United States abduct the children from their parents and remove them to China. The abduction is perfectly legal under Chinese law, though it plainly constitutes a felony in the United States. The American parents are without an avenue of redress against the Chinese government because, under the rule of this case, the discretionary function exception would properly be applied.

Other remarkable anomalies flow from the panel's decision. One, victims of car accidents clearly can seek relief under FSIA, but victims of government-sponsored kidnappings could not. Two, since United States officials plainly enjoy no immunity for criminal acts under FTCA, citizens of this country victimized by crimes would have greater redress against the United States government than against those of foriegn countries. Whatever theoretical arguments in support of such differences in liability might be mustered, it is hard to imagine that the elected representatives of the American people wrote them into law. Whether they did is certainly a question meriting this court's attention.

CONCLUSION

With knowledge of the existence of a valid California custody order, Norway and its agents assisted Elisabeth Antonsen Risk in illegally removing her children from the United States. Norway's acts, which the Ninth Circuit found were protected by the discretionary function exception, amount to a felony under California law. Before this decision, there was no precedent under FTCA or FSIA for the proposition that sovereigns have discretion to commit serious criminal acts with impunity. Now, the Ninth Circuit has held that felonious acts can be protected by the discretionary function exception. Congress did not intend to create impunity for crime. The discretionary function exception exists to allow sovereigns to carry out social and political agendas without fear of tort liability. It simply should not be within the power of a foreign government to commit felonies on this country's soil in the name of "policy." This Court should settle this issue by granting certiorari and adopting the bright-line rule contained in *Letelier*: there is no discretion under § 1605(a)(5)(A) of FSIA to commit, or to have one's agents commit, an act constituting a felony under United States law.

For the reasons stated above, this petition for a writ of certiorari should be granted.

Dated: November 14, 1991

Respectfully submitted

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Attorney for
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APPENDIX A

LARRY RISK, individually and as Guardian Ad Litem for KARIMA RISK and JAMIL RISK, *Plaintiff-Appellant,*

vs.

K.I. HALVORSEN; OLAF SOLLI, *Defendants-Appellees.*

LARRY RISK, individually and as Guardian Ad Litem for KARIMA RISK and JAMIL RISK, *Plaintiff-Appellant,*

vs.

KINGDOM OF NORWAY, *Defendant-Appellee.*

Nos. 88-15803, 89-15701.

United States Court of Appeals, Ninth Circuit

Argued and Submitted Oct. 4, 1990.

Decided June 5, 1991.

[Headnote Omitted]

Before SCHROEDER, FERGUSON and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

Appellant Larry Risk, individually and as guardian *ad litem* for his two minor children, sued the Kingdom of Norway ("Norway") and two Norwegian Consular officials, Knut Halvorsen and Olaf Solli ("Halvorsen" and "Solli"), for torts allegedly committed by those parties in connection with the removal of Risk's children from California in violation of a temporary custody order of the San Francisco Superior Court. The complaint alleges (a) interference with parent-child relations; (b) intentional infliction of emotional distress; and (c) the existence of a conspiracy to remove the children from California.

In separate orders, the district court dismissed these parties from the action, finding that they are immune from civil liability for the acts alleged in the complaint. 707 F.Supp. 1159. We assert jurisdiction under 28 U.S.C. § 1291 and affirm.

FACTS

In 1977 Plaintiff Larry Risk married Elisabeth Antonsen Risk, a native and citizen of Norway. In 1983 the Risk family — Larry, Elisabeth and their two children — moved to Norway for a period. After an attempt by Larry to remove the children to the United States, Elisabeth received a temporary order from a Norwegian County Court providing ordinary visitation rights for the father. During the first visitation period Larry returned with the children to the United States.

In 1984 Elisabeth filed a petition in the Superior Court of San Francisco seeking custody of the two children. The parties were awarded joint custody and the superior court order prohibited the parents from removing the children from the five San Francisco Bay Area counties. In addition, the parties were required to surrender their children's passports and their own to Larry Risk's attorney, and were prohibited from applying for replacement passports without a court order. In July 1984, apparently with the assistance of various Norwegian government officials, Elisabeth Risk returned to Norway with her children.

Larry Risk filed this action in April, 1988, alleging that the Norwegian government and its consular officials conspired to violate and in fact violate the 1984 California custody order by suggesting to Elisabeth Risk that she return to Norway with the children; by providing travel documentation for Elisabeth and the children; by providing financial assistance to Elisabeth to make the trip; and, finally, by obstructing Larry Risk in his effort to locate and contact his children.

DISCUSSION

I. Standard of Review

[1] The district court's separate decisions dismissing appellees from the action involved pure questions of law, and as such, are reviewed do novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

II. Dismissal of Norway

Appellant argued in the district court, and asserts here, that Norway is within the jurisdiction of the trial court under the Foreign Sovereign Immunity Act of 1976 ("FSIA").[1] The Act provides that "the district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to relief either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a).

A.

The district court rejected jurisdiction over Norway under the FSIA because of an exception to the general jurisdiction provision, section 1605(a)(5), which excludes claims based on the exercise or performance, or failure to exercise or perform, a discretionary function.[2]

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[1]Pub.L. No. 94-583 90 Stat. 2891-92, 2894-98 (1976), *codified at* 28 U.S.C. §§ 1330, 1332(a)(2), (4), 1391(f), 1441(d), 1602-1611.

[2]28 U.S.C. 1605(a) provides that a foreign state is not immune from the jurisdiction of courts of the United States . . . in any case —

* * * * * * * *

> (5) [i]n which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except that this paragraph shall not apply to —

[2] Whether the acts of the Norwegian officials are within the discretionary function exception to the FSIA is controlled by principles developed under the Federal Tort Claims Act ("FTCA"). *Joseph v. Nigeria*, 830 F.2d 1018, 1026 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988). First, we "must determine whether the government employee had any discretion to act or if there was an element of choice as to appropriate conduct." *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989), *cert. dismissed*, ____ U.S. ____, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990) (citing *Berkovitz v. United States*, 486 U.S. 531, 535, 108 S.Ct. 1954, 1957, 100 L.Ed.2d 531 (1988)). Second, we consider "whether the decisions were grounded in social, economic, and political policy," concentrating on "the nature of the conduct, rather than the status of the actor . . . ." *MacArthur Area Citizens Ass'n v. Peru*, 809 F.2d 918, 922 (D.C. Cir. 1987), *vacated on other grounds*, 823 F.2d 606 (1987) (quoting *United States v. Varig*, 467 U.S. 797, 813, 814, 104 S.Ct. 2755, 2764, 2765, 81 L.Ed.2d 660 (1984)).

In *MacArthur*, a neighborhood association sued the Republic of Peru for occupation and use of a building in violation of a zoning ordinance. The circuit court for the District of Columbia held that the discretionary function exception to the FSIA applied because the establishment of a chancery in a particular building, and modification of that building for security purposes, is a discretionary act of public policy, both political and economic in nature. *MacArthur*, 809 F.2d at 923.

In *Joseph v. Nigeria*, 830 F.2d 1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988), we declined to apply the discretionary function exception to acts of officials of the Nigerian government which led to a tort suit. In that case, the government officials were accused of destruction of the property in which the Nigerian consulate was located. We held that while acquisition and operation of the property was a discretionary function, purely destructive acts are not part of the

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(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . .

policy decision to establish the consulate and thus fall outside the scope of the discretionary function exception. *Id.* at 1027.

[3] The acts of the agents of the Norwegian government are closer to those of the officials in *MacArthur* and thus the discretionary function exception applies.

The Norwegian officials are accused of advising and assisting a Norwegian citizen and her children in leaving the United States. There can be no doubt the officials here were exercising discretion.

Moreover, each of the acts alleged by appellant are within those expressly within the function of consular officials according to the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 ("VCCR"). Article 5, sections (d) and (e) of that document, to which the United States and Norway are signatories, defines consular functions in part as "issuing passports and travel documents to nationals of the sending state. . ." and "helping and assisting nationals, both individuals and bodies corporate, of the sending state." Acts covered by the VCCR presumptively are "grounded in social, economic, and political policy" and thus the conduct of the Norwegian officials satisfies the second prong of the discretionary function analysis contained in *Liu*.

B.

Appellant argues that because the acts of the Norwegian officials may constitute a violation of California criminal law,[3] acts should fall outside the scope of the discretionary function exception to the FSIA, and thus that the district court should have retained jurisdiction over Norway. Appellant relies principally on three cases in which federal courts have refused to apply FSIA immunity to criminal acts.

In *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), the widow of a citizen of the Republic of China ("ROC"), whose

---

[3]Intentional violation of a custody order, or of the rights of a parent under such an order is a felony in California. Calif. Penal Code § 278.5 (West 1988).

murder allegedly was directed by the director of that country's Defense Intelligence Bureau, brought a wrongful death suit in federal court. This court refused to apply the discretionary function exception to the FSIA. We held that because the acts in this case violated ROC law, they were not discretionary and thus fell outside coverage of the discretionary function exception. *Id.* at 1431. ("[W]e hold that the discretionary function exception is inapplicable when an employee of a foreign government violates its own internal law."). This case has no application to the facts here. There is no assertion that the Norwegian officials violated any Norwegian law.

Appellant relies next on *Gerritsen v. de la Madrid Hurtado,* 819 F.2d 1511 (9th Cir. 1987). In that case this court also refused to apply the discretionary function exception to Mexican officials who allegedly kidnapped and assaulted the plaintiff in an attempt to prevent his criticism of the Mexican government. This court held that the discretionary function exception did not apply because the acts alleged were not "decisions to 'establish governmental policy' . . . but rather [were] acts to 'carry out policy' or acts at the 'operational level.'" *Id.* at 1518 (citing *Olsen v. Mexico,* 729 F.2d 641, 647 (9th Cir.), *cert. denied,* 469 U.S. 917, 105 S.Ct. 295, 83 L.Ed.2d 230 (1984)). Appellant's reliance on *Gerritsen* is misplaced. This circuit has abandoned the "planning/operations" distinction in conducting discretionary function analysis pursuant to the Supreme Court's decision in *United States v. Varig,* 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). *See e.g., Mitchell v. United States* 787 F.2d 466, 468 (9th Cir. 1986) (planning-operational distinction has been abandoned), *cert. denied,* 484 U.S. 856, 108 S.Ct. 163, 98 L.Ed.2d 118 (1987); *Chamberlin v. Isen,* 779 F.2d 522, 524 (9th Cir.) (same); *Begay v. United States,* 768 F.2d 1059, 1062-63 n. 2 (9th Cir. 1985) (same).

Finally, appellant relies on *Letelier v. Republic of Chile,* 488 F.Supp. 665 (D.D.C. 1980). In that case, members of the families of a Chilean national and his assistant who were ordered assassinated by members of the Chilean government brought a tort action against Chile in federal court. The district court refused to apply the discretionary function exception to the FSIA,

stating that "there is not discretion to commit, or to have one's officers or agents commit, an illegal act. . . . Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals." *Id.* at 673.

[4, 5] While the Letelier court apparently considered "action that is clearly contrary to the precepts of humanity" outside the scope of the discretionary function exception, *id.*, the nature of the act in that case obviously influenced the court. In this case, the most that can be said is that Norwegian officials issued travel documents to a Norwegian citizen and her children, also citizens of Norway; that they provided funds for her travel; and that they protected her from contact by her former husband. Although these acts may constitute a crime under California law, it cannot be said that every conceivably illegal act is outside the scope of the discretionary function exception. *MacArthur*, 809 F.2d at 922 n. 4.

The district court correctly held that the discretionary function exception to the FSIA applies in this case and that it has no jurisdiction to hear the claims against Norway.

III. Dismissal of Consular Officials

A.

[6] The district court asserted jurisdiction over defendants Solli and Halvorsen, officials of the Norwegian Consulate, under 28 U.S.C. § 1351 which provides: "The district court shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against (1) consuls or vice consuls of foreign states. . . . " Jurisdiction under § 1351 may be limited by treaty. *Gerritsen v. de al Madrid Hurtado* 819 F.2d 1511, 1515 (9th Cir. 1987).

The VCCR governs questions of consular immunity and as such limits jurisdiction under § 1351. *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1027 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988); *Gerritsen*, 819 F.2d at 1515.

Article 43(1) of the VCCR states that "Consular officials and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed *in the exercise of consular functions.*" (emphasis added).

"Consular functions" are defined in Article 5 of the VCCR and include:

> (d) issuing passports and travel documents to nationals of the sending state, . . .
>
> (e) helping and assisting nationals . . . of the sending state;

The district court held that because the acts allegedly undertaken by defendants Solli and Halvorsen fall within those consular activities immunized by the VCCR, consular officials Halvorsen and Solli should be dismissed.

[7] The complaint alleges: (1) that defendant Solli suggested to Johans Sandvin, an employee of the Norwegian Seaman's Mission, that Elisabeth Risk obtain identification papers and travel to Norway via Canada; (2) that defendant Halvorsen delivered to Elisabeth a Norwegian Seaman's Certificate of Identity which contained an attestation by Halvorsen that Elisabeth is a Norwegian subject; and (3) that upon being contacted by Larry Risk, Halvorsen denied knowing Elisabeth. These actions fall within those consular functions specifically immunized by the VCCR sections above. For that reason, the district court was correct to dismiss defendants Halvorsen and Solli from the action.

B.

Appellant argues that the VCCR does not immunize these consular officials for participation in the acts alleged because the Convention does not apply to criminal activity. He relies on *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987). In that case, a plaintiff sued Mexican consular officials for various torts and civil rights violations. Defendants argued that they were immune under the VCCR for the performance of "consular functions." *Id.* at 1516. This court held that no such

immunity existed because the alleged acts of the consular officials, including assault and kidnapping, were not consular functions and thus fell outside the coverage of the VCCR. *Id.* at 1516-17.

Relying on *Gerritsen*, appellant argues that because Solli's and Halvorsen's conduct might be construed as criminal under California law, *see supra note* 3, it should not receive VCCR protection. As the district court noted, the consular activities in Gerritsen were covered by VCCR Article 5, sections (a) and (m), each of which provides immunity for consular actions "provided they are within the limits permitted by international law;" or "are not prohibited by the laws and regulations of receiving state. . . . " 819 F.2d at 1516 (citing 21 U.S.T. at 82-85) (emphasis in the court of appeals' opinion).

The provisions of the VCCR relied on by Solli and Halvorsen (Article 5, sections (d) and (e)), on the other hand, contain no such limiting language. Because the conduct of the consular officials alleged in the complaint falls squarely within these sections of the VCCR, the district court correctly granted these defendants' motions to dismiss.

C.

The district court found, as an alternative ground for dismissing the complaint against Halvorsen and Solli, that the consular officials were entitled to immunity under Article XVI of the Treaty of Friendship, Commerce and Consular Rights between the United States and Norway. We need not address that issue because we hold that the officials are immune under the VCCR.

IV. Conclusion

The district court properly determined that it lacked jurisdiction over Norway because in this case Norway is immune from civil suit under the discretionary function exception to the FSIA. Defendants Solli and Halvorsen correctly were dismissed from the action because they are immune from civil liability under Article 5, sections (d) and (e) of the VCCR. The separate orders

of the district court dismissing Norway, Solli, and Halvorsen from this action are

AFFIRMED.

APPENDIX B

No. 89-15701

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY RISK, individually and as Guardian Ad Litem for
KARIMA RISK and JAMIL RISK
Plaintiff-Appellant,

VS.

KINGDOM OF NORWAY,
Defendant-Appellee.

ORDER

D.C. No. CV-88-1435-WWS

Before SCHROEDER, FERGUSON, and BRUNETTI, Circuit Judges:

Judges Schroeder and Brunetti have voted to reject the suggestion for a rehearing en banc. Judge Ferguson so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The suggestion for a rehearing en banc is rejected.

[Filed in this court on August 16, 1991]

Supreme Court, U.S.
FILED
DEC 9 1991
OFFICE OF THE CLERK

(2)

No. 91-820

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

LARRY RISK, et al.,
Petitioners,

VS.

THE KINGDOM OF NORWAY,
Respondent.

BRIEF OF KINGDOM OF NORWAY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does this case fall within 28 U.S.C. § 1605(a)(5), the noncommercial tort exception to the foreign sovereign immunity granted by 28 U.S.C. § 1604, assuming, *arguendo*, that:

a. A Norwegian citizen mother took her two minor children, also Norwegian citizens, to Norway from California on July 16, 1984, even though a temporary custody order of the San Francisco Superior Court then prohibited her from removing the children from the San Francisco Bay Area;

b. The Norwegian mother's failure to comply with the custody order violated California Penal Code § 278.5;

c. A Norwegian consular officer stationed in Los Angeles, California, being aware of the custody order and its travel restrictions, issued a Norwegian Seaman's Certificate of Identity to the mother in Los Angeles while she was en route to Norway with her children;

d. Another Norwegian consular officer, stationed in San Francisco, California, being then aware of the custody order and its travel restrictions, had previously suggested that the Norwegian mother return to Norway with her children via Canada?

2. If this case does fall within 28 U.S.C. § 1605(a)(5) by reason of the conduct of the Norwegian consular officers, does respondent Kingdom of Norway ("Norway") nevertheless have foreign sovereign immunity from suit pursuant to 28 U.S.C. § 1605(a)(5)(A), the discretionary function exception to the liability imposed by 28 U.S.C. § 1605(a)(5)?

3. Does Norway have foreign sovereign immunity from suit under 28 U.S.C. § 1604 because petitioner's claims are based in part on alleged acts or omissions of Norwegian officials in Norway?

4. Are petitioner's claims against Norway time-barred by California Code of Civil Procedure § 340(3) because more than one year had elapsed between the alleged occurrence of the acts complained of and the filing of the action in the district court below?

TABLE OF CONTENTS

	Page
Questions Presented	i
Statements of Facts	1
Summary of Argument	3
Argument	4
A. The Petition For Certiorari Should Be Denied Because Petitioner Lacks Clean Hands	4
B. Norway Has Foreign Sovereign Immunity With Respect To Petitioner's Claims That Are Based On The Alleged Conduct In California Of Norwegian Consular Officers Halvorsen And Solli	6
1. Introduction	6
2. The Foreign Sovereign Immunity Act of 1976	8
a. The Noncommercial Tort Exception To Foreign Sovereign Immunity	9
b. The Discretionary Function Exception To The Noncommercial Tort Exception	10
3. Because The Functions Performed By Norwegian Consular Officers Halvorsen And Solli Were Authorized By The Vienna Convention On Consular Relations, Their Conduct Was Not Tortious And Norway Therefore Has Foreign Sovereign Immunity	13
4. The United States Has Acknowledged That The Functions Performed By Consular Officers Halvorsen And Solli Are Authorized By The Vienna Convention	16
5. If The Alleged Conduct Of Consular Officers Halvorsen and Solli Does Fall Within 28 U.S.C. § 1605(a)(5), Norway Is Neverthe-	

TABLE OF CONTENTS

Page

less Immune From Suit Because Their Conduct Also Falls Within The Discretionary Function Exception To The Noncommercial Tort Exception To Foreign Sovereign Immunity 18

6. Petitioner's Contention That The Discretionary Function Exception To The Noncommercial Tort Exception To Foreign Sovereign Immunity Does Not Apply In This Case Because Consular Officers Halvorsen And Solli Allegedly Participated In the Commission Of A Crime Under California Law Is Without Merit 21

C. Norway Has Foreign Sovereign Immunity If Petitioner's Claims Are Based On Alleged Acts of Norwegian Officials In Norway..... 25

D. Because Larry Risk's Claims Are Time Barred By California Code of Civil Procedure § 340(3), The Petition Should Be Denied Even If The Court Of Appeals Erred In Affirming The District Court's Dismissal of The Case As Against Norway On The Ground Of Foreign Sovereign Immunity 27

Conclusion 30

TABLE OF AUTHORITIES

Cases

	Page
Agnew v. Parks, 172 Cal.App.2d 756, 343 P.2d 118 (1959)	29
Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984)	10, 26
Begay v. United States, 768 F.2d 1059 (9th Cir. 1985)	13
Chamberlin v. Isen, 779 F.2d 522 (9th Cir. 1985)	13
Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956 (1953)	11
Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 (1970)	27
DeGarmo v. Goldman, 19 Cal.2d 755 (1942)	5
F.E.L. Publications v. Catholic Bishop of Chicago, 506 F.Supp. 1127 (E.D. Ill. 1981)	5
Fibreboard Paper Products Corp. v. East Bay Union, 227 Cal.App.2d 675, 39 Cal.Rptr. 64 (1964)	5
Four Corners Helicopters, Inc. v. Turbomeca S.A., 677 F.Supp. 1096 (D.C. Col. 1988)	26
Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985)	26
Gibbons v. Republic of Ireland, 532 F.Supp. 668 (D.C. 1982)	10
Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018 (9th Cir. 1987)	12
Kuehnert v. Texstar Corporation, 412 F.2d 700 (5th Cir. 1969)	5
Letelier v. Republic of Chile, 488 F.Supp. 665 (D.C. D.C. 1980)	24
Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989)	24

TABLE OF AUTHORITIES

CASES

	Page
MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918 (D.C. Cir. 1987)	10, 23
Makeu v. CBS, Inc., 201 Cal.App.3d 662 (1988)	29
McDowell v. Union Mutual Life Ins. Co., 404 F.Supp. 136 (C.D. Cal. 1975)	28
McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983)	10
Mitchell v. United States, 787 F.2d 466 (9th Cir. 1986)	12, 13
Murphy v. Allstate Ins. Co., 83 Cal.App.3d 38, 147 Cal.Rptr. 565 (1978)	28
Nicholson v. McClatchy Newspapers, 177 Cal.App.3d 509, 233 Cal.Rptr. 58 (1986)	29
Olsen by Sheldon v. Government of Mexico, 729 F.2d 641 (9th Cir. 1984)	11, 26
People v. Beach, 194 Cal.App.3d 955 (1987)	3
Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984)	26
Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 65 S.Ct. 993 (1945)	5
Priola v. Paulino, 72 Cal.App.3d 380 (1977)	28
Rodriguez v. Bethlehem Steel Corporation, 12 Cal.3d 382 (1974)	28
Teitelbaum v. Borders, 206 Cal.App.2d 634 (1962)	28
U.S. v. Harvis Const. Co., Inc., 857 F.2d 1360 (9th Cir. 1988)	27
United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 104 S.Ct. 2755 (1984)	12

TABLE OF AUTHORITIES

CASES

Page

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 103 S.Ct. 1962 (1983) 8

Statutes

California Civil Code Section 4600.1 3

California Code of Civil Procedure
Section 340(3) ..... ii, 4, 27, 28, 29

California Penal Code
Section 278.5 ..... i, 4, 21
Section 278.5(a) 28
Section 278.5(b) 21
Section 279(e) 5

United States Code
28 U.S.C. § 1330 8
28 U.S.C. § 1602 8
28 U.S.C. § 1604 ..... i, ii, 4, 8, 27
28 U.S.C. § 1605(A) 21
28 U.S.C. § 1605(a)(2) 10
28 U.S.C. § 1605(a)(5) .....
..... i, 3, 4, 9, 10, 13, 14, 18, 19, 22, 23, 26, 27
28 U.S.C. § 1605(a)(5)(A) 4, 10, 19, 24, 25
28 U.S.C. §§ 1605-1607 8
28 U.S.C. § 2671 11
28 U.S.C. § 2680(a) 11

Rules

Supreme Court Rules
10.1(a) 3
10.1(b) 3

TABLE OF AUTHORITIES

Treatise

	Page
Restatement of Judgments, Second, § 15	3
Restatement of the Foreign Relations Law of the United States, Third § 211	7

No. 91-820

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

LARRY RISK, et al.,
Petitioners,

VS.

THE KINGDOM OF NORWAY,
Respondent.

BRIEF OF KINGDOM OF NORWAY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, The Kingdom of Norway ("Norway"), opposes the petition of Larry Risk to this Court to issue a writ of certiorari to review a decision of the Court of Appeals for the Ninth Circuit which became final on August 16, 1991, 936 F.2d 393.[1] That decision unanimously affirmed a judgment of the United States District Court for the Northern District of California which dismissed, as against Norway, a complaint for damages against Norway and others filed by petitioner in April, 1988.

STATEMENT OF FACTS[2]

Petitioner's purported Statement of Facts (Petition, pp. 3-6) is misleadingly incomplete. The following additional relevant facts are included in the district court's Memorandum of Decision and Order, 707 F. Supp. 1159 at 1161-62:[3]

---

[1]The caption of the petition refers to "Larry Risk, et al., Petitioners." In fact, Mr. Risk is the only petitioner, suing both on his own behalf and as guardian *ad litem* for the Risk children. Accordingly, Mr. Risk is referred to as "petitioner" in this brief.

[2]In this brief, as in the petition, ER refers to the Appellant's Excerpts of Record filed with the court of appeals; SER refers to Appellee's Supplemental Excerpt of Record; CR refers to items included in the district court docket.

[3]The district court's statement was based on its judicial notice of a June, 1987 decision of the Norwegian Supreme Court which upheld the jurisdiction of the City Court of Bergen, Norway, to determine the custody of the Risk children in an action commenced by Elisabeth Risk against Larry Risk in 1985, after her return to Norway with the children. That decision found the facts summarized in the district court's opinion after the presentation of evidence and litigation of the jurisdictional issue by both parties. The decision also held that the Risk children are citizens of both Norway and the United States.

> In July 1983 the Risk family — Larry Risk, Elisabeth Antonsen Risk and their children Karima and Jamil Risk — left the United States to live in Norway for a year. (Norway's Exh. 4, translation of decision of Norwegian Supreme Court, at 1.) Later that year, after an attempt by Larry Risk to take the children back to the United States while Elisabeth Risk was hospitalized, Elisabeth Risk requested and received a temporary custody order from a Norwegian County Court. (*Id.*) That order gave Larry Risk "ordinary visitation rights." (*Id.*) During the first visitation period, Larry Risk took the children and returned with them to the United States. (*Id.* at 1-2.)

The Court of Appeals' decision includes essentially the same statement. (Appendix to Petition, p. 2A; 936 F.2d at 394)

Larry Risk states that he filed this lawsuit only "after exhausting other avenues of relief," presumably to establish contact with his children. (Petition, p. 6.) That is incorrect. After the Norwegian Supreme Court's determination that the Norwegian courts had jurisdiction to decide custody of the Risk children, Mr. Risk did not participate in the custody proceedings that followed in the Norwegian trial court. Despite his failure to do so, Mr. Risk was granted visitation rights on certain conditions. (SER at p. 57.) However, to the best of respondent's knowledge, Mr. Risk has never exercised those visitation rights — nor has he made any of the child support payments ordered by the Norwegian trial court.

The Norwegian Supreme Court decision is included in the SER at pp. 1-11 and its English translation is set forth at pp. 12-22 of the SER. This Court is respectfully requested to take judicial notice of the Norwegian decision pursuant to Rule 201 of the Federal Rules of Evidence.

SUMMARY OF ARGUMENT

The decision of the court of appeals does not warrant review by this Court on writ of certiorari. The decision obviously does not fall within Supreme Court Rule 10.1(a) or (b). Nor, for the following reasons, are there special or important reasons to review the court of appeals' decision of the questions of federal law which it addressed.

First, petitioner lacks clean hands because in 1983 he took the Risk children from Norway to the United States in violation of a temporary custody order issued by a Norwegian court;[4]

Second, the alleged conduct of Norwegian consular officers Halvorsen and Solli in California does not fall within 28 U.S.C. § 1605(a)(5), the noncommercial tort

---

[4]Petitioner contends that an Indiana trial court held that the Norwegian court lacked jurisdiction to issue the temporary custody order. (Petition, p. 4.) However, there is no information in the trial court docket respecting court proceedings in Indiana. Petitioner attached an uncertified transcript of an Indiana court proceeding to his reply brief in the court of appeals, which did not take judicial notice thereof.

There is no question that Larry Risk violated a valid Norwegian temporary custody order when he left Norway with the children in 1983. That the Norwegian decree was valid under Norwegian law was conclusively determined by the Norwegian Supreme Court in the litigation between Risk and Mrs. Risk that followed Mrs. Risk's return to Norway with the children. Moreover, under California law a court of general jurisdiction where a child is physically located has jurisdiction to issue temporary custody orders when the welfare of the child is threatened, e.g., through abduction by one of the parents, pendng the court's final determination of jurisdiction. *See People v. Beach,* 194 Cal.App.3d 955, 967-971 (1987); California Civil Code Section 4600.1. In any event, the Indiana decision was superseded by the 1987 Norwegian Supreme Court decision. *Restatement of Judgments, Second,* § 15.

exception to the foreign sovereign immunity granted by 28 U.S.C. § 1604, because their conduct was expressly authorized by the Vienna Convention on Consular Relations, 21 UST 78 *et seq.* ("the Vienna Convention"), of which the United States and Norway are signatories;

Third, the Court of Appeals correctly held that the alleged acts of Norwegian consular officers Halvorsen and Solli in California fall within 28 U.S.C. § 1605(a)(5)(A), the discretionary function exception to the noncommercial tort exception to foreign sovereign immunity;

Fourth, Norway has foreign sovereign immunity if the petition is based on alleged activities of Norwegian officials in Norway, because those elements of the alleged noncommercial tort did not occur in the United States, as required by 28 U.S.C. § 1605(a)(5); and

Fifth, even if the court of appeals erred, the petition should be denied because petitioner's claims against Norway are barred by the applicable statute of limitations, California Code of Civil Procedure § 340(3).

ARGUMENT

A. The Petition For Certiorari Should Be Denied Because Petitioner Lacks Clean Hands

Based on the judicially noticed facts set forth in the decisions of the courts below, it is apparent that petitioner Larry Risk lacks clean hands with respect to the events out of which this petition arises. Larry Risk accuses defendant Elisabeth Risk of having violated California Penal Code Section 278.5 and bases the petition primarily on respondent Norway's alleged complicity therein. But if she is guilty of that crime, so is Larry Risk,

who knowingly violated a Norwegian custody order when he took the Risk children from Norway to California in 1983. California Penal Code Section 279(e) provides that "violation of Section . . . 278.5 is punishable in California, whether the intent to commit the offense is formed within or without the state . . . *if the child thereafter is found in California.*" (Emphasis added)

Larry Risk thus contends that one lawbreaker is entitled to recover damages against the other (and third parties) if the tables are turned in the course of unlawful behavior by both. That contention should be rejected. Of course, two wrongs do not make a right. But both wrongs surely should be considered in determining whether the first wrongdoer is entitled to judicial relief in the courts of the United States. Because Larry Risk does not come to this Court with clean hands, the petition should be denied.[5]

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[5] *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 997 (1945) (maxim that he who comes to a court of equity must have clean hands "is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant"); *accord: DeGarmo v. Goldman*, 19 Cal.2d 755, 764 (1942) ("Any unconscientious conduct upon [a plaintiff's] part which is connected with the controversy will repel him from the forum whose very foundation is good conscience").

Under both federal and California law the requirement of clean hands applies to plaintiffs bringing legal as well as equitable actions. *Kuehnert v. Texstar Corporation*, 412 F.2d 700, 704 (5th Cir. 1969) (doctrine of unclean hands applied to claim for damages "since it expresses a general principle equally suited to damage actions."); *F.E.L. Publications v. Catholic Bishop of Chicago*, 506 F. Supp. 1127, 1137 (E.D. Ill. 1981) (same); *Fibreboard Paper Products Corp. v. East Bay Union*, 227 Cal.App.2d 675, 728, 39 Cal.Rptr. 64 (1964).

B. Norway Has Foreign Sovereign Immunity With Respect To Petitioner's Claims That Are Based On The Alleged Conduct In California Of Norwegian Consular Officers Halvorsen And Solli

1. Introduction.

The petition alleges a course of conduct which includes supposed acts and omissions of various defendants in the United States and Norway that extended from January, 1984 to the filing of the complaint in the district court in April, 1988. However, the petition appears to be based primarily on the following events, alleged to have occurred in California between January and July, 1984:

— The issuance of a custody order by the San Francisco Superior Court on January 30, 1984, which prohibited removal of the Risk children from the San Francisco Bay Area.

— The delivery by K. I. Halvorsen, Vice-Consul at the Los Angeles Norwegian Consulate, of a Norwegian Seaman's Certificate of Identity to Elisabeth Risk in Los Angeles while she was returning to Norway with the Risk children on July 16, 1984, when Halvorsen was allegedly aware of the custody order.

— The alleged subsequent denial by Halvorsen to Larry Risk in July, 1984, that Halvorsen had been contacted by Elisabeth Risk or had heard of her.

— The alleged prior suggestion by defendant Olaf Solli, the Norwegian Consul General in San Francisco, to defendant Johans Sandvin, when Solli was allegedly aware of the custody order, that Elisabeth

Risk and the Risk children travel to Norway via Canada.[6]

It is clear that no claim for relief is stated against Norway based on the alleged suggestion of Consul General Olaf Solli to defendant Sandvin because it bore no fruit: Elisabeth Risk did not in fact return to Norway with her children via Canada. It is *not* alleged that Solli played any role whatever in Elisabeth Risk's return to Norway with the Risk children via Los Angeles on July 16, 1984, or even that he knew that it was occurring. It is therefore apparent that petitioner's claims against Norway are based essentially on Vice-Consul Halvorsen's issuance of a Norwegian Seaman's Certificate of Identity to Elisabeth Risk in Los Angeles on July 16, 1984 while she was returning to Norway with the Risk children.[7]

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[6]Petitioners also allege that the provisions of the custody order were disclosed to the Norwegian Foreign Ministry and the Norwegian Justice Ministry in Norway in February, 1984; that a Norwegian Justice Ministry official in Norway thereafter stated, in a telephone conversation with defendant Sandvin, that the best solution for the problem Sandvin had described would be for Elisabeth Risk and the Risk children to travel to Norway; and that Norwegian officials in Norway provided funds for Elisabeth Risk for subsistence, legal fees, and travel expenses. As discussed below (pp. 25-27 infra), the petition should be denied if it is based in part on these alleged activities of Norwegian officials in Norway.

[7]Petitioner repeatedly refers to the Risk children as American citizens. While that is true, they are also Norwegian citizens and nationals under Norwegian Law, as expressly determined by the Norwegian Supreme Court (SER at p. 12). As Norway demonstrated before the district court, the children have Norwegian citizenship because of their mother's Norwegian citizenship. See expert opinion of Professor E. Smith, discussed at CR 43, p. 14 et seq. The United States will accept that nationality because a "genuine link" exists between Norway and the Risk children. Restatement of the Foreign Relations Law of the United States, Third § 211. In the reverse situation, involving children of a mother who is a U.S. citizen married

By reason of the Foreign Sovereign Immunity Act of 1976, petitioner has no claim against Norway based on the alleged conduct of Norwegian consular officers Halvorsen and Solli.

2. The Foreign Sovereign Immunity Act of 1976

Foreign sovereign immunity is given modern-day expression in the United States in the Foreign Sovereign Immunity Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq.* ("FSIA"). Section 1604 of Title 28, United States Code ("§ 1604"), provides in relevant part:

> . . . . a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in [28 U.S.C. §§ 1605-1607]

United States courts lack both subject matter jurisdiction and personal jurisdiction with respect to an action against a foreign state to which § 1604 is applicable. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 fn.5, 103 S.Ct. 1962 (1983).[8]

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to a Norwegian citizen and residing in Norway, the children are U.S. citizens under U.S. law. 8 U.S.C. 1401(g).

[8]The legislative history of the Foreign Sovereign Immunity Act of 1976 and the historical developments prompting its enactment are described in H.R. Rep. No. 1487, 94th Cong. 2d Sess. 7 (1976) ("House Report"), *reprinted in* 31976 U.S. Code Cong. and Ad. News 6604, 6605-6 ("U.S. Code Cong. and Ad. News"). A copy of the House Report is included in the SER at pp. 60-91.

As explicated by this Court in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 486-9, the FSIA was enacted primarily because of concern that U.S. citizens would not otherwise have access to U.S. courts to resolve commercial disputes with foreign governmental entities engaged in trade. This problem was seen as particularly acute because of the increasing participation of foreign state enterprises in

a. The Noncommercial Tort Exception To Foreign Sovereign Immunity.

Petitioner seeks to invoke the exception to § 1604 provided by Section 1605(a)(5) of Title 28, United States Code ("§ 1605(a)(5)"), which provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
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> • • •
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> (5) . . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to — (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Section 1605(a)(5) is commonly referred to as the "noncommercial tort exception" to foreign sovereign immu-

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commercial activities. U.S. Code Cong. and Ad. News, *supra*, at 6605. Congress enacted the FSIA to codify sovereign immunity as then recognized and practiced in international law and to align U.S. practice with that of other nations. *Id.*

nity. Subsections (A) and (B) thereof are referred to as "the exceptions to the noncommercial tort exception."

The principal purpose of the noncommercial tort exception to foreign sovereign immunity is to provide U.S. citizens access to United States courts to sue for injuries incurred in automobile accidents in the United States involving officials, agents or employees of foreign states. *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 587 (9th Cir. 1983); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir. 1984). The House Report devoted less than one of its 46 pages to § 1605(a)(5), stating simply that "[it] is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities." U.S. Code Cong. and Ad. News, *supra* at 6619.

The legislative history of the FSIA and cases interpreting the Act make clear that the noncommercial tort exception should be narrowly construed. *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987). See also *Gibbons v. Republic of Ireland*, 532 F. Supp. 668, 671 (D.C. 1982) ("[T]his court must respect the immunity of a foreign sovereign unless some exception to the rule of foreign sovereign immunity is clearly warranted").

b. The Discretionary Function Exception To The Noncommercial Tort Exception.

Subsection (A) of § 1605(a)(5) ("§ 1605(a)(5)(A)") preserves foreign sovereign immunity as to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." The purpose of this

provision is to preserve foreign sovereign immunity for acts involving the exercise of judgment by foreign officials in the course of performing their governmental functions. *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 645 (9th Cir. 1984).

In interpreting the discretionary function exception the federal courts have relied in part on decisions construing the analogous discretionary function exception found in the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* ("FTCA"), 28 U.S.C. § 2680(a), which served as a model for § 1605(a)(5)(A).[9] *Cong. Code and Ad. News, supra* at 6615. The principles which apply to the interpretation of § 2680(a) were set forth by this Court in *Dalehite v. United States*, 346 U.S. 15, 35-36, 73 S.Ct. 956 (1953), as follows:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. *Where there is room for policy judgment and decision there is discretion.* It necessarily follows that acts of

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[9] 28 U.S.C. § 2680(a) provides in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
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> (a) Any claim based upon an act or omission of an employee of the Government, . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

> subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. (Emphasis added.)

After confirming the continued validity of *Dalehite* in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S.Ct. 2755 (1984) (*"Varig"*) this Court added:

> [I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in *Dalehite,* the exception covers "[n]ot only agencies of government . . . *but all employees exercising discretion.*" [467 U.S. at 813.] (Emphasis added.)

In *Joseph v. Office of Consulate General of Nigeria,* 830 F.2d 1018, 1026 (9th Cir. 1987), a case decided under the Foreign Sovereign Immunity Act, the court adopted the *Varig* principle, saying

> . . . . the court must inquire whether the governmental acts at issue were "grounded in social, economic, and political policy." *Id. In other words, the court should avoid second guessing policy decisions through the medium of a tort action. Id.* The execution of a policy decision by subordinates, even those subordinates at the operational level, comes under the discretionary function exception *if the acts involved the exercise of policy judgment.* (Emphasis added.)[10]

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[10]A distinction between acts on the *planning* level and acts on the *operational* level previously employed by the Ninth Circuit Court of Appeals in FTCA cases has been abandoned as incompatible with *Varig. See, e.g., Joseph v. Office of Consulate General of Nigeria,* 830 F.2d 1018, 1026 (9th Cir. 1987); *Mitchell v. United States,* 787 F.2d

In the instant case the district court wisely noted that while deference to policy decisions of governmental officials is required under both the FTCA and the FSIA, additional foreign policy considerations are implicated when a claim of foreign sovereign immunity is asserted, saying:

> The purpose of the discretionary function exception under the FTCA, like that under the FSIA, is to avoid interference with governmental policymaking. In applying the exception under the FSIA, however, the courts must consider the additional risk of interfering with foreign relations. As a result there is reason to construe the exclusion of criminal acts from the discretionary function exception more narrowly under the FSIA than under the FTCA, and hence give the discretionary function exception wider scope. 707 F.Supp. 1159 at 1166, fnte 10.

3. Because The Functions Performed By Norwegian Consular Officers Halvorsen And Solli Were Authorized By The Vienna Convention On Consular Relations, Their Conduct Was Not Tortious And Norway Therefore Has Foreign Sovereign Immunity.

Under the noncommercial tort exception to foreign sovereign immunity, a foreign state is made liable (subject to specified exceptions) for, *inter alia,* personal injuries "occurring in the United States and caused by the *tortious* act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C.

466, 468 (9th Cir. 1986); *Chamberlin v. Isen,* 779 F.2d 522, 524 (9th Cir. 1985); *Begay v. United States,* 768 F.2d 1059, 1062-63 n.2 (9th Cir. 1985).

§ 1605(a)(5). (Emphasis added.) Petitioner contends that a foreign state may be held liable under 28 U.S.C. § 1605 for the tortious act or omission of a consular officer, even though the officer himself is immune from suit, under the Vienna Convention or otherwise. This contention is questionable.[11] But even if it were true, that would have no application to this case because neither Halvorsen or Solli committed a wrongful, i.e. *tortious,* Act in assisting or advising Elisabeth Risk.

The vicarious liability imposed on foreign nations by 28 U.S.C. § 1605(a)(5) is obviously based on the familiar principle of respondeat superior, pursuant to which an employer is liable *if his employee engages in wrongful conduct vis-a-vis the plaintiff.* There is no basis for the imposition of such vicarious liability on Norway in this case because the alleged conduct of Vice-Consul Halvorsen and Consul General Solli occurred in the course of their performance of consular functions specifically authorized by subsections (d) and (e) of Article 5 of the Vienna Convention. *Those acts were therefore not wrongful, even if inconsistent with California law.*

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[11]Respondent is unaware of any case holding a foreign country liable in tort for the acts of an official who was himself immune from suit. There is nothing in the FSIA or in decisions interpreting the Act which suggests that a foreign state may be held liable for acts of its consular officials which are authorized by the Vienna Convention.

The Vienna Convention governs the rights of each signatory nation to establish and maintain consular representation within the territory of the other signatories. Both the United States and Norway are parties to the Convention. Article 5 of the Convention, entitled "Consular Functions," sets forth in detail the functions which consular officials of the "sending state" are authorized to perform in the "receiving state". Among the consular functions enumerated in Article 5, those defined in subsections 5(d) and (e) apply to the alleged conduct of Messrs. Halvorsen and Solli:

* * *

(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;

* * *

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

* * *

The foregoing provisions describe only two of a number of consular functions authorized by Article 5 of the Vienna Convention. As to *some* of those activities, whether or not they constitute consular functions is *expressly made contingent* on their not being violative of the law of the receiving state.[12] However, neither subsection (d) nor

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[12]Such activities are permissible only if "there is nothing contrary thereto in the laws and regulations of the receiving State" (Article 5(f)), or the activities are "in accordance with the laws and regulations of the receiving State" (Articles 5(g) and (i)), or "within the limits imposed by the laws and regulations of the receiving State" (Article 5(h)). Other subdivisions require that the

subsection (e) contains similar language respecting the consular functions they define and authorize. As the courts below held and the United States confirmed in its *amicus curiae* brief in a related appeal in the court below, the omission of such qualifying language with respect to those consular functions was not an oversight. *Rather, the Vienna Convention clearly recognizes that those defined functions may be performed by a foreign consular officer whether or not their performance is compatible with the laws of the receiving state in a particular case.*[13]

4. The United States Has Acknowledged That The Functions Performed By Consular Officers Halvorsen And Solli Are Authorized By The Vienna Convention.

The United States filed a brief as *amicus curiae* in appeal No. 88-15803 in the court below, which was taken from the trial court's dismissal of this action as against Halvorsen and Solli.[14] At pages 7-13 thereof, the United States discussed the application of the Vienna Convention

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functions they describe be "compatible with the laws and regulations of the receiving State" (Article 5(j)), or "not prohibited by the laws and regulations of the receiving State" (Article 5(m)).

[13]Petitioner appears to believe that the Vienna Convention is concerned primarily with establishing the existence and scope of consular immunity. That is not the case. Analysis of its provisions shows that the primary purpose of the Convention is to express agreement upon the permissible activities of consular officials of one state in the territory of another state — in other words, to describe the rights of the signatory nations vis-a-vis each other rather than the immunities of their officials. Consular immunity is an adjunct, albeit a necessary one, to that primary purpose.

[14]The Court is respectfully requested to take judicial notice of Part I (pp. 7-16) of the brief of the United States as *amicus curiae* in Appeal No. 88-15803 in the court below.

to the functions performed by Messrs. Halvorsen and Solli in this case.[15] Noting that their conduct involved the consular functions described in subdivisions (d) and (e) of Article 5 of the Vienna Convention, the United States stated:

> . . . U.S. consular officers perform many acts, similar to the ones allegedly performed by defendants Solli and Halvorsen. They issue travel documents and passports for their citizens living abroad and perform all attendant acts which would facilitate departure from a foreign country to the United States. Such acts could include meeting their nationals at the foreign nation's airport or providing them with transportation to such airport. Moreover, U.S. consular officials often give advice concerning travel plans (advice such as that allegedly given by defendant Solli) to their nationals and dependent children for returning to their home country, the United States. *Id.*, pp. 12-13.
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> • • •
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> Sovereign states obviously have a strong interest in assisting their nationals and their children in returning home. But if U.S. consular officers could be subjected to intrusive court inquiry merely by a plaintiff's characterization of travel advice as criminal under a foreign state's law, consular immunity would be greatly impaired and the ability of U.S. officers to serve U.S. citizens would be impeded. It is,

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[15] In its *amicus* brief the United States opposed affirmance of the district court's decision insofar as it based the consular immunity of Messrs. Halvorsen and Solli on the Treaty of Friendship Commerce and Consular Rights between the United States and Norway but did not oppose their immunity insofar as it was based on the Vienna Convention.

> in short, the underlying nature of the conduct which should control the question of consular immunity, not a litigant's characterization of that conduct. *Id.*, pp. 13-14.
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> . . . For all the above reasons, plaintiff's suggestion that conduct that can be characterized as criminal automatically falls outside of Article 5(d) [of the Vienna Convention] must fail.

Based on the foregoing statement, the alleged acts of Halvorsen and Solli also fall within subdivision (m) of Article 5 of the Vienna Convention, being consular functions "to which no objection is taken by the [United States]."

5. If The Alleged Conduct of Consular Officers Halvorsen and Solli Does Fall Within 28 U.S.C. § 1605(a)(5), Norway Is Nevertheless Immune From Suit Because Their Conduct Also Falls Within The Discretionary Function Exception to the Noncommercial Tort Exception to Foreign Sovereign Immunity.

The alleged acts of Norwegian consular officers Halvorsen and Solli are that while they were aware of the San Francisco Superior Court custody order and the travel restrictions therein, (1) Vice-Consul Halvorsen issued a Norwegian Seaman's Certificate of Identity to Elisabeth Risk on July 16, 1984, while she was returning to Norway with the Risk children, and subsequently denied to Larry Risk that he had been contacted by Elisabeth Risk or had heard of her and (2) Consul General Solli earlier suggested to defendant Sandvin that Elisabeth Risk and her children travel to Norway via Canada.

Subsection A of § 1605(a)(5) preserves foreign sovereign immunity as to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." The courts below correctly determined that the alleged conduct of Messrs. Halvorsen and Solli falls within § 1605(a)(5)(A).

The complaint alleges that Messrs. Halvorsen and Solli acted within the course and scope of their employment. (Complaint, para. 4, p. 2, lines 8-9.) It is clear both from that allegation and from the conduct complained of that the alleged actions of Halvorsen and Solli were of a public or governmental nature. It is equally clear that *each* of the acts involved a decision by a Norwegian consular officer whether to act or refrain from acting, which necessarily involved the making of one or more policy judgments. Accordingly, as the courts below ruled, the alleged acts of Halvorsen and Solli occurred in the performance of discretionary functions and were based on policy decisions falling within § 1605(a)(5)(A).[16]

Petitioner contends that because Halvorsen and Solli were then allegedly aware of the custody order, they should not have acted as they did. But even if that were true — whether judged by United States or Norwegian law or public policy — Norway nevertheless has foreign sovereign immunity under § 1605(a)(5)(A) which applies "*regardless of whether the discretion be abused.*" (Emphasis added.)

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[16]Petitioner's claim based on Halvorsen's alleged wrongful denial concerning any contact with Elisabeth Risk is also barred by subsection (B) of 28 U.S.C. § 1605(a)(5) because it is one "arising out of . . . misrepresentation [or] deceit . . . ."

The district court's decision that the alleged acts of consular officers Halvorsen and Solli constituted discretionary functions was based on its determination that (1) a sovereign's issuance of travel documents and funds to its citizens, and taking other actions in aid of its citizens' interests, are policy decisions, based on social, legal, and perhaps political considerations, (2) the decision to assist the Mrs. Risk and her children in returning to Norway implements Norway's policies concerning the protection of its citizens, (3) exercising jurisdiction in this case would encroach on Norway's ability to make policy decisions about its nationals and (4) in applying the discretionary function exception a court must consider the risk of interfering with the foreign relations of the United States. (707 F. Supp. at 1166, including footnote 10).

In its decision the court of appeals said:

> The Norwegian officials are accused of advising and assisting a Norwegian citizen and her children in leaving the United States. There can be no doubt the officials here were exercising discretion.
>
> Moreover, each of the acts alleged by appellant are within those expressly within the function of consular officials according to the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 ("VCCR"). Article 5, sections (d) and (e) of that document, to which the United States and Norway are signatories, defines consular functions in part as "issuing passports and travel documents to nationals, both individuals and bodies corporate, of the sending state." Acts covered by the VCCR presumptively are "grounded in social, economic, and political policy" and thus the conduct of the Norwegian officials satisfies the second prong of the discretion-

ary function analysis contained in Liu. (Appendix to Petition, p. 5A; 936 F.2d at 395-396)

6. Petitioner's Contention That The Discretionary Function Exception To The Noncommercial Tort Exception To Foreign Sovereign Immunity Does Not Apply In This Case Because Consular Officers Halvorsen And Solli Allegedly Participated In The Commission Of A Crime Under California Law Is Without Merit.

Norway does not understand petitioner to contend that the functions performed by consular officers Halvorsen and Solli *were not in fact discretionary functions* within the meaning of 28 U.S.C. § 1605(A). Instead, petitioner contends that (1) their conduct violated California Penal Code Section 278.5.[17] and (2) the discretionary function

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[17]The alleged conduct of consular officers Halvorsen and Solli in 1984 did not in fact violate California Penal Code § 278.5(a), which applies to a person who "... in violation of the physical custody or visitation ... order ... *takes* ... *the child* with the intent to deprive another person of his ... rights to physical custody or visitation." (Emphasis added.) It is not alleged that either Halvorsen or Solli took the Risk children from San Francisco Bay Area or to Norway. Nor did their alleged conduct violate California Penal Code § 278.5(b), which proscribes certain conduct by a person "*who has a right to physical custody of or visitation with a child.*" (Emphasis added.) The most that the complaint could be contended to allege is that the described acts of Halvorsen and Solli are criminal because they aided and abetted Elisabeth Risk's violation of Penal Code § 278.5 in returning to Norway with the Risk children. However, the complaint falls short of doing so because it does *not* allege that either Halvorsen or Solli was aware of Penal Code § 278.5 or that his assistance or advice to Elisabeth Risk might violate that statute. For example, with respect to Vice-Consul Halvorsen, all that is alleged is that defendant Sandvin "... informed Halvorsen of the pending custody case and of the specific prohibitions on travel contained in

exception does not apply to acts of a consular officer which violate the criminal law of the state wherein acts occur.[18] The courts below correctly rejected petitioner's contention that the alleged criminality of the discretionary policy decisions made by Halvorsen and Solli automatically made § 1605(a)(5) applicable and subsection (A) thereof inapplicable in this case.

The district court said (1) "[t]hat those decisions may conflict with decisions made by a California court does not render them any less entitled to the immunity under the FSIA" and (2) that "... attaching the label of kidnapping to the conduct at issue is not sufficient to overcome the policy attributes of Norway's decision to aid its nationals in conformity with its own laws, regardless of the resulting conflict with California law" (707 F. Supp. at pp. 1166-1167). In so ruling, the district court recognized both that a different conclusion might be reached concerning other conduct of foreign consular officers in other circumstances and that "[d]rawing the line between immune and non-immune acts violating the law of another state will rarely be an easy task" (707 F. Supp. at 1166).

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the January 30th order of the San Francisco Superior Court." (Complaint, para. 17, p. 7, lines 4-9.)

[18]In support of this assertion, petitioner cites cases which purportedly hold that criminal acts do not fall within the discretionary function exception to the Federal Tort Claims Act. (Petition, p. 10). However, the cited cases do not so hold, but instead decide only that conduct which exceeds a federal official's authority or which violates regulations established to govern his exercise of authority does not fall within the discretionary function exception. None of the FTCA cases addresses a situation where conduct within the scope of a federal official's authority and complying with regulations governing its exercise was alleged to violate a state criminal provision.

Petitioner mischaracterizes the court of appeals' decision as holding that a foreign state can never be liable under 28 U.S.C. § 1605(a)(5) for conduct which the foreign state authorized, and thus as "intended to leave the power to define the scope of tort liability in the hands of foreign states." (Petition, p. 12) In fact, the court below decided only that whether conduct by a foreign state falls outside the discretionary function exception if it violates the law of the receiving state depends on the facts of each individual case:

> While the Letelier court apparently considered "action that is clearly contrary to the precepts of humanity" outside the scope of the discretionary function exception, *id.*, the nature of the act in that case obviously influenced the court. In this case, the most than can be said is that Norwegian officials issued travel documents to a Norwegian citizen and her children, also citizens of Norway; that they provided funds for her travel; and that they protected her from contact by her former husband. Although these acts may constitute a crime under California law, it cannot be said that every conceivably illegal act is outside the scope of the discretionary function exception. (Appendix to Petition, p. 7A; 936 F.2d at 396)

Similarly, in its *amicus curiae* brief in the court below, the United States asserted that "plaintiff's contention that conduct that can be characterized as criminal automatically falls outside of Article 5(d) [of the Vienna Convention] must fail."

MacArthur Area Citizens Ass'n v. Republic of Peru, *supra*, 809 F.2d. 918 (D.C. Cir. 1987) necessarily decided that the discretionary function exception is not automatically made inapplicable if the conduct in question violates the receiving state's law. There, Peru purchased a build-

ing in the District of Columbia and converted it into a chancery. *Id.* at 919. Because the result was unsightly, a neighborhood association sued for damages, alleging, *inter alia,* that Peru's activities violated a criminal provision of an applicable zoning law. The district court dismissed the suit on the ground of foreign sovereign immunity, and the Court of Appeals for the District of Columbia Circuit affirmed pursuant to, *inter alia,* the FSIA's discretionary function exception.

The authorities relied upon by petitioner do not support his contention that § 1605(a)(5)(A) is inapplicable in this case. *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), held that the discretionary act exception was inapplicable because the Chinese courts had held that the foreign state had not authorized the conduct in question. Accordingly, the court did not reach the question whether the discretionary function exception is automatically inapplicable to conduct which is authorized by a foreign state but violative of the law of the receiving state. In the instant case the same court of appeals held the contrary.

Petitioner contends that *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.C. D.C. 1980) adopted a "bright line rule" that the discretionary function exception does not apply to acts of foreign states which constitute felonies under United States law. (Petition, p. 14) Although the Republic of Chile did not rely upon the discretionary function exception in *Letelier* (488 F.Supp. at 671), it was nevertheless discussed by the district court. However, the court did not announce a "bright line rule" applicable to all felonies. While the *Letelier* court did say, in passing, that there is no discretion under the FSIA for a foreign state to commit an illegal act, the holding of the case is clearly much more limited:

. . . .

> Whatever policy options may exist for a foreign country it has no "discretion" *to perpetrate conduct designed to result in the assassination of an individual or individuals*, action that is clearly contrary to the precepts of humanity as recognized in both national and international law. Accordingly there would be no "discretion" within the meaning of section 1605(a)(5)(A) *to order or to aid in an assassination* and were it to be demonstrated that a foreign state has undertaken any *such act* in this country, that foreign state could not be accorded sovereign immunity under subsection (A) for any tort claims resulting from its conduct. As a consequence, the Republic of Chile cannot claim sovereign immunity under the Foreign Sovereign Immunities Act for its alleged involvement in the deaths of Orlando Letelier and Ronni Moffitt. (488 F.Supp. at 673) (Emphasis added.)

C. Norway Has Foreign Sovereign Immunity If Petitioner's Claims Are Based On Alleged Acts Of Norwegian Officials In Norway

As stated above, the petition appears to be based primarily on alleged conduct of consular officers Halvorsen and Solli in California. However, petitioner also refers to alleged activities of other Norwegian officials acting in Norway, particularly insofar as petitioner alleges a conspiracy among all of the defendants named in the complaint. If petitioner relies on those activities, the petition should be denied. Both the legislative history of the FSIA and virtually all case law establish that the noncommercial tort exception applies *only* where the *entire* alleged tort — *i.e.*, all wrongful acts *and* injuries — occurred in the United States. Thus, the House Report said:

> [§ 1605(a)(5)] denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; *the tortious act or omission must occur within the jurisdiction of the United States*, and must not come within one of the exceptions enumerated in the second paragraph of the subsection. (Emphasis added.) [Cong. Code and Ad. News, *supra*, at 6619.]

This statement has been relied upon in many decisions upholding claims of foreign sovereign immunity because the foreign country's alleged acts or omissions did not occur within the United States. *See, e.g., Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985) ("... Congress intended that the tortious act or omission, as well as the injury, occur in the United States"); *Asociacion de Reclamantes v. United Mexican States, supra*, 735 F.2d 1517 at 1524-5, (D.C. Cir. 1984); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984) ("... *both* the tort *and* the injury must occur in the United States" (emphasis added)); *Four Corners Helicopters, Inc. v. Turbomeca S.A.*, 677 F.Supp. 1096, 1102 (D.C. Col. 1988) ("The *entire tort* must have occurred in the United States"). (Emphasis added.)[19]

If petitioner's claims are based on alleged acts of Norwegian officials or employees in Norway, the requirement that the *entire tort* (all wrongful acts *and* resulting injury) take place in the United States is clearly not met in this case and the noncommercial tort exception to the

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[19] *Olsen by Sheldon v. Government of Mexico, supra*, 729 F.2d 641, decided by the court below, departed to a degree from this interpretation of § 1605(a)(5). The court of appeals obviously did not regard that decision to be applicable to this case.

foreign sovereign immunity granted by 28 U.S.C. § 1604 does not apply. The effect of this requirement in the instant case is threefold:

1. If petitioner is contending that the alleged conduct of Messrs. Halvorsen and Solli in California was directed by or enmeshed with the conduct of Norwegian officials in Norway, his claims against Norway do not fall within § 1605(a)(5) because elements of such a combined course of conduct did not occur within the United States.

2. For the same reason, petitioner's conspiracy claim, i.e., that all defendants participated in a common and combined course of conduct, does not fall within § 1605(a)(5).

3. If petitioner purports to state a separate claim against Norway, based solely upon the conduct of Norwegian officials acting in Norway, that claim does not meet the requirement of § 1605(a)(5) that both the alleged tortious conduct and its consequences must occur within the United States.

D. Because Larry Risk's Claims Are Time Barred By California Code of Civil Procedure § 340(3), The Petition Should Be Denied Even If The Court Of Appeals Erred In Affirming The District Court's Dismissal Of The Case As Against Norway On The Ground Of Foreign Sovereign Immunity

It is well established that "[t]he prevailing party may . . . assert in a reviewing court any grounds in support of his judgment, whether or not that ground was relied on or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 fn.6, 90 S.Ct. 1153 (1970). *See also U.S. v. Harvis Const. Co., Inc.*, 857 F.2d 1360, 1363 (9th Cir. 1988) (statute of limitations issue may be raised

to sustain judgment on appeal despite trial court's rejection of that argument and decision on other grounds.)

California Code of Civil Procedure § 340(3) ("C.C.P. § 340(3)") requires an action "for injury to . . . one caused by the wrongful act . . . of another" to be brought within one year after the cause of action arose. Accordingly, C.C.P. § 340(3) applies to any wrongful act-which results in personal injury. 3 Witkin *California Procedure, Actions*, § 403 (3d ed. 1985). C.C.P. § 340(3) therefore bars Larry Risk's claims against Norway because the injuries he allegedly incurred in 1984 — e.g., severe emotional distress, mental and emotional injury, humiliation, pain and suffering, and intentional interference with his right to consortium with his children — are all personal injuries. *Murphy v. Allstate Ins. Co.*, 83 Cal.App.3d 38, 50, 147 Cal.Rptr. 565 (1978); *McDowell v. Union Mutual Life Ins. Co.*, 404 F.Supp. 136, 147 (C.D. Cal. 1975). In addition, C.C.P. § 340(3) applies to an action for loss of spousal consortium (*see Rodriguez v. Bethlehem Steel Corporation*, 12 Cal.3d 382, 408 n.30 (1974); *Priola v. Paulino*, 72 Cal.App.3d 380, 383 (1977)) and thus, by analogy, to an action for loss of consortium in the parent-child context — the gravamen of Larry Risk's claims for relief.

Under California law a cause of action arises when a wrongful act is done and injury thereby inflicted. 3 Witkin, *California Procedure Actions*, § 351 (3d ed. 1985), and cases cited therein. The mere allegation of a continuing wrong or continuing damages does not toll the running of the statute of limitations. *See Teitelbaum v. Borders*, 206 Cal.App.2d 634, 637-38 (1962).

This action is based on the alleged involvement of defendants in the return of the Risk children to Norway on July 16, 1984. On or about that date, the allegedly wrongful acts were done, Larry Risk's alleged injuries

(deprivation of consortium, emotional distress, etc.) were incurred, and liability, if any, arose. Mr. Risk had *one year* thereafter to file his complaint, but it was not filed until *April 19, 1988*, almost *four years* later. Consequently, Mr. Risk's cause of action based on the return of the Risk children to Norway in July, 1984, is barred by C.C.P. § 340(3).[20]

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[20]Petitioner alleges in the Second Cause of Action that "the remaining defendants, and each of them, willfully and knowingly . . . conspired with defendant Elisabeth Antonsen Risk to abduct, entice, harbor and conceal Karima Risk and Jamil Risk from plaintiff Larry Risk" (Complaint, para. 30, p. 12, lines 5-9). Larry Risk's claims are nevertheless barred by C.C.P. § 340(3). There is no separate tort of civil conspiracy under California law. 5 Witkin, *Summary of California Law Torts*, § 44 (9th ed. 1988); *Nicholson v. McClatchy Newspapers*, 177 Cal.App.3d 509, 521, 233 Cal.Rptr. 58 (1986); *Agnew v. Parks*, 172 Cal.App.2d 756, 762, 343 P.2d 118 (1959). Therefore, the applicable statute of limitations is determined by the nature of the substantive causes of action in connection with which a conspiracy is alleged. *Maheu v. CBS, Inc.*, 201 Cal.App.3d 662, 673 (1988). As discussed above, C.C.P. § 340(3) applies to all of the substantive causes of action pleaded in the complaint. Accordingly, the applicable limitations period for all of Larry Risk's causes of action against Norway is one year, even though a conspiracy is alleged.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

DATED: December 9, 1991

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No. 91-820

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

LARRY RISK,
Petitioner,

VS.

THE KINGDOM OF NORWAY,
Respondent.

SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LARRY RISK,
Plaintiff.

v.

KINGDOM OF NORWAY, et al.,
Defendants.

No. C-88-1435-WWS

MEMORANDUM OF DECISION AND ORDER

Plaintiff Larry Risk, suing individually and as guardian *ad litem* for his two minor children, brings this action against the Kingdom of Norway ("Norway"), the Norwegian Seaman's Mission ("Mission"), and five individuals, including his wife, Elisabeth Antonsen Risk, and Jacob Frode Knudsen ("Knudsen"), a religious minister employed by the Mission, arising out of the removal of Risk's children from California in violation of a temporary custody order of the San Francisco Superior Court.[1] On his behalf Risk alleges interference with his parental relationship with his children, intentional infliction of emotional distress, and conspiracy by the defendants to remove the children from California. On behalf of his children he alleges interference with their right to parental consortium.

Defendants have made the following motions: (1) a motion by Norway, the Mission, and Knudsen to dismiss the claims against them for lack of subject matter jurisdiction; (2) a motion by Norway, the Mission, and Knudsen to dismiss the action by Larry Risk for himself and as guardian *ad litem* on the ground of the act of state doctrine; (3) a motion by Norway, the Mission, and Knudsen to dismiss the claims by Larry Risk on the ground that the limitations period has run; (4) a motion by the Mission and

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[1] Two consular officials have been previously dismissed on the ground of consular immunity.

Knudsen to disqualify Larry Risk as guardian *ad litem* for his children; and (5) a motion by Knudsen to dismiss for failure to state a claim against him.

I. Factual Background

In July 1983 the Risk family—Larry Risk, Elisabeth Antonsen Risk and their children Karima and Jamil Risk—left the United States to live in Norway for a year. (Norway's Exh. 4, translation of decision of Norwegian Supreme Court, at 1.) Later that year, after an attempt by Larry Risk to take the children back to the United States while Elisabeth Risk was hospitalized, Elisabeth Risk requested and received a temporary custody order from a Norwegian County Court. (*Id.*) That order gave Larry Risk "ordinary visitation rights." (*Id.*)

During the first visitation period, Larry Risk took the children and returned with them to the United States. (*Id.* at 1-2.)

Elisabeth Risk then returned to the United States and filed a petition in the Superior Court for the City and County of San Francisco ("San Francisco Superior Court") seeking custody of the children. (Complaint at ¶ 12.) In January 1984, Elisabeth and Larry Risk were awarded joint custody of the children. (Risk's Joint Response, Ex. A, Order of San Francisco Superior Court, at 1-2.) The custody order barred the Risks from removing the children from the Bay Area, required them to surrender their passports and those of their children to Larry Risk's counsel, and forbade them from "applying for, obtaining, or directing any other party to apply for on behalf of either party or the minor children a passport . . . without prior order of a California Court." (*Id.* at 2-3.)

In July 1984, Elisabeth Risk took the children and returned to Norway.

In April 1988, Larry Risk filed this action. His complaint alleges that an agent of the Mission contacted officials of the Norwegian consulate, that these officials provided Elisabeth Risk with funds for traveling to Norway and with traveling papers for herself and the children, all under Elisabeth's maiden name. (Complaint at ¶¶ 16-18.) It further alleges that defendant Knud-

sen, an official in the Norwegian Seamen's Church, covered up Elisabeth's flight, and that when Larry Risk went to Norway in an attempt to locate his children, the Norwegian government frustrated his efforts. (Complaint at ¶¶ 17-23.) Finally, it alleges an agreement between the Norwegian government and Elisabeth Risk to inform her if Larry Risk arrives in Norway and to assist her "in assuring that Larry Risk will not be able to locate her or his children while he is in Norway." (Complaint at ¶ 23.)

Elisabeth Risk and the children remain in Norway, and she has not appeared in this action.

II. Subject Matter Jurisdiction

Defendants contend that the Court lacks subject matter jurisdiction (1) over the claim on behalf of the Risk children because of lack of diversity under 28 United States Code section 1332(a), and (2) over the entire action by Larry Risk for himself and as guardian *ad litem* for the Risk children on the ground of sovereign immunity.

A. Diversity jurisdiction over the Risk children's claim

Larry Risk alleges that the Risk children are citizens of California and the United States. (Complaint at ¶ 8.) The Mission and Norway, however, have produced evidence, including a decision of the Norwegian Supreme Court, that the children are also Norwegian citizens. (*See* Norway's Motion to Dismiss, ex. 3 at 1.) On the basis of that evidence, defendants contend that, regardless of the children's California citizenship, their Norwegian citizenship defeats diversity jurisdiction under 28 United States Code section 1332(a)(2) because all defendants are Norwegian citizens.[2]

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[2] Rather than relying on lack of diversity, Norway contends that under *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), the Court should not exercise jurisdiction over a dispute between a state and its national. In *De Sanchez*, a Nicaraguan plaintiff brought suit against a Nicaraguan bank; the Fifth Circuit held that it should not intervene in a dispute between a state and its national where the bank's actions did not violate human rights or "call into question the territorial sovereignty of the United States." 770 F.2d at 1397-98. *De Sanchez* is

This appears to be an issue of first impression. Other courts have, however, addressed the analogous situation of a plaintiff, who is a citizen of a state of the United States, asserting dual foreign citizenship to create diversity. Courts have reached different results in that situation. In *Aguirre v. Nagel,* 270 F. Supp. 535, 536 (E.D. Mich. 1967), the district court stated that it did not 'deem it good law to deny the existence of jurisdiction under [28 United States Code section 1332(a)] subsection (2) on the grounds of non-existence of jurisdiction under subsection (1)." *Aguirre* has been criticized by commentators as inconsistent both with the principle of complete diversity, 1 *Moore's Federal Practice,* ¶ 0.75[1.-1] at 709.4-.5 (1986); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3621 at 581-82 (2d ed. 1984), and with the rationale of avoiding bias against out-of-state residents underlying diversity jurisdiction, 13B C. Wright, A. Miller & E. Cooper at 582. Subsequent courts have not followed *Aguirre. Sadat v. Mertes,* 615 F.2d 1176 (7th Cir. 1980); *Nazareth Candy Co. v. Sherwood Group, Inc.,* 683 F. Supp. 539 (M.D. N.C. 1988); *Raphael v. Hertzberg,* 470 F. Supp. 984, 986 (C.D. Cal. 1979), *appeal dismissed,* 636 F.2d 1227 (9th Cir. 1980). For example, in *Raphael* the court, relying on the requirement of complete diversity and noting the inequities that would result if dual citizens had greater access to the courts than do solely United States citizens, stated that there was no jurisdiction over a claim against California defendants by a "dual national" residing in California.[3] 470 F. Supp. at 986.

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distinguishable; Norway, as discussed below, is alleged to have committed torts within the United States, and the Risk children are American as well as Norwegian citizens. Thus the United States has an interest in this dispute, which involves its citizens and acts within its territory.

[3] In *Raphael,* the court held that there was no diversity because plaintiff was solely a United States citizen, but then went on to accept for purposes of argument plaintiff's claim to dual nationality, and discussed the result under that theory. The district court also based its decision on the "ever rising level of criticism of the very concept of diversity jurisdiction." However, as the Seventh Circuit noted, "not even the proponents of the abolition of diversity jurisdiction over suits between citizens of the several United States have advocated elimina-

In *Sadat v. Mertes,* the Seventh Circuit addressed a slightly different situation. Plaintiff was an American citizen residing in Egypt and therefore not a citizen of any state for purposes of jurisdiction under section 1332(a)(1). 615 F.2d at 1182. He sued other American citizens for damages suffered in an auto accident in the United States, asserting alienage jurisdiction as an Egyptian citizen. *Id.* The defendants denied that he was an Egyptian citizen, but argued that even if he were, that citizenship should be disregarded for purposes of section 1332(a)(2). The Seventh Circuit held, basing its decision on a concern for uniform treatment and on the principles underlying diversity jurisdiction, that there was no jurisdiction over his claim against other American citizens. 615 F.2d at 118. First, it reasoned that dual nationality should not give a citizen a right not given similarly situated solely United States citizens. *Id.* at 1185-86, 1188. Second, it stated that, despite plaintiff's dual nationality, the foreign nation would be unlikely to complain about a state court's treatment of him, particularly if his dominant nationality was American. *Id.* at 1186-1188. And, finally, it saw little reason to fear local bias if the plaintiff, as a resident of that state, is forced into state court. *Id.* at 1186 n.13.

The instant case differs from those previously decided in that it is the defendant who is relying on plaintiff's foreign citizenship to defeat diversity, rather than the plaintiff who is relying on it to create diversity.

Notwithstanding that difference, the principles developed in those cases are relevant. Those principles are uniformity of treatment of dual and solely United States citizens, the requirement of complete diversity,[4] and the need to protect foreign

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tion of alienage jurisdiction." *Sadat v. Mertes,* 615 F.2d 1176, 1182 (7th Cir. 1980).

[4] The principle of complete diversity stems from the decision in *Strawbridge v. Curtiss,* 7 U.S. 267, 3 Cranch 265 (1806). It has been applied to a number of different situations. *See, e.g., Local Union 598 v. J.A. Jones Constr. Co.,* 846 F.2d 1213, 1215 (9th Cir.), *aff'd.* 109 S.Ct. 210 (1988) (complete diversity required for case to be removed on diversity of citizenship grounds); *Munoz v. Small Business Admin.,* 644 F.2d 1361, 1366 (9th Cir. 1981) (refusing to exercise pendent party

citizens against bias in state court and to avoid friction with foreign nations.

In the instant case, these principles are in tension. Denying jurisdiction would deny the children, because they are dual citizens, access to the court they would otherwise have as California citizens, while giving them access would violate the requirement of complete diversity since Norwegian citizens would be suing each other. With these two factors cancelling each other out, what is decisive is that the Risk children, as California residents, need not fear local bias and Norway, recognizing the children's dual citizenship, is unlikely to complain of their treatment by a state court. Since the factors that counsel against asserting jurisdiction predominate, the claim of the Risk children must be dismissed.[5]

B. Foreign Sovereign Immunity

Larry Risk asserts that the Court has jurisdiction of his claims against Norway under the Foreign Sovereign Immunity Act of 1976 ("FSIA"),[6] which provides that "the district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to relief either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a). Risk also asserts that the Court has jurisdiction over his claims against the Mission as an "agency or instrumentality" of Norway (Complaint at ¶ 5) or on the basis of diversity (id. at ¶ 8).

1. Jurisdiction Over Norway

Norway contends that it is entitled to immunity (1) on all claims because it did not commit any torts within the United

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jurisdiction, in part because to do so would effectively overrule the complete diversity requirement in *Strawbridge*).

[5] It is therefore unnecessary to reach the motion to disqualify Larry Risk as guardian *ad litem* for the Risk children.

[6] Pub. L. No. 94-583 90 Stat. 2891-92, 2894-98 (1976), *codified at* 28 U.S.C. §§ 1330, 1332(a)(2),(4), 1391(f), 1441(d), 1602-1611.

States; (2) on the claims asserted on behalf of the Risk children because any damage suffered by the Risk children would have occurred in Norway; and (3) on all the claims because its actions involved the performance of discretionary functions. It also contends that because the Risk children are Norwegian citizens, this dispute should be resolved in Norway. Risk contends that (1) Norway is subject to the jurisdiction of this Court on the claims by both Risk and the Risk children because it committed torts within the United States; (2) Norway has not shown that it delegated to its consular officers discretion broad enough to encompass the acts Risk has alleged; and (3) the discretionary function exception under the FSIA does not apply to illegal acts.

a. Commission of Acts Within the United States

The FSIA provides that a foreign state is not immune from suits for money damages for 'personal injury or death, or damage to or loss of property, *occurring in the United States*." 28 U.S.C. § 1605(a)(5) (emphasis added).

The torts Norway is alleged to have committed are interference with Larry Risk's relationship with his children (Complaint at ¶¶ 11-28), conspiracy to interfere with that relationship (*id.* at ¶¶ 29-32), intentional infliction of emotional distress (*id.* at ¶¶ 33-36), and interference with the Risk children's relationship with their father (*id.* at ¶¶ 37-39). These torts are based upon allegations that Norway's agents advised Elisabeth Risk to take the children back to Norway, and issued her travel documents and funds to do so; supplied her with funds for legal fees in connection with the California custody proceedings; declined to respond to Larry Risk's inquiries about the children and to requests to help him in locating the children in Norway; advised Elisabeth Risk of Larry Risk's arrival in Norway; helped her hide the children; and entered into an agreement with her to help her hide the children on any subsequent visits by Larry Risk.

In *Olsen by Sheldon v. Government of Mexico*, the Ninth Circuit rejected the rule that all the tortious conduct complained of must occur in the United States for the federal court to have jurisdiction under section 1605(a)(5). 729 F.2d 641, 646 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984). There children had

brought suit against Mexico for the wrongful death of their parents in an airplane crash which occurred on United States territory during an attempt to land a plane at Tijuana. The Ninth Circuit held that "if plaintiffs allege at least one entire tort occurring in the United States, they may claim under section 1605(a)(5)." *Id.* at 646.

Larry Risk alleges actions by Norwegian officials in the United States—conspiring with Elisabeth Risk, giving her advice, issuing her papers, and providing her with funds to travel to Norway—that violate Risk's right to maintain a parental relationship with his children. This tort, as alleged, as well as the torts of intentional infliction of emotional distress and of interfering with the Risk children's relationship with their father, occurred in the United States, and thus brings the case within section 1605(a)(5).[7]

b. Discretionary function exemption

Section 1605(a)(5) of the FSIA creates an exception from liability for claims based upon the exercise or performance, or failure to exercise or perform, a discretionary function.[8] Application of the discretionary function exception is controlled by the principles developed under the Federal Tort Claims Act ("FTCA"). *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1026 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1077

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[7] That the children may have suffered damage from these torts while in Norway does not affect this conclusion.

[8] 28 U.S.C. § 1605(a)(5) provides in part that a foreign state is not immune from the jurisdiction of courts of the United States . . . in any case—

* * *

(5) [I]n which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except that this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . .

(1988); H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 21, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6620 (exceptions to section 1605(a)(5) "correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. § 2680(a) and (h)"). Thus, under the FSIA, as under the FTCA, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies." *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984). The Court must refrain from "'secondguessing' . . . decisions grounded in social, economic, and political policy." *Id.* at 814.

The issuance of identification documents is a function recognized as being among the powers exercised by consular officials by the Vienna Convention on Consular Relations. Vienna Convention on Consular Relations, April 24, 1963, art. 5(d) (consular functions). Even if the officials abused their power, its exercise remains within their discretion. While other consular functions authorized by the Vienna Convention are subject to the limitation that they may not violate the law of the receiving state, the issuance of travel documents is not so limited. *Id.* Moreover, issuing travel papers to one's nationals, including in this case the related acts of giving them funds with which to travel, along with advice, is a decision governed by considerations of social policy, and therefore within the discretionary function exception.

The central issue here is whether the discretionary function exception applies to acts that violate the domestic law of the United States. Risk argues that because a conspiracy to remove a child from the parent having custody is a crime,[9] the discretionary function exception should not apply. Risk relies on cases exclud-

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[9] The intentional violation of one parent's custody rights by another is a crime in California. Cal. Penal Code § 278.5 (West 1988). Norway argues that Larry Risk has not alleged a violation of Penal Code section 278.5 because the complaint alleges only knowledge of the pending case and the temporary custody order , not knowledge of Risk's custody and visitation rights. (Norway's Reply at 8, n.5.) However, violation of an interim custody order also violates section 278.5. *See People v. Beach*, 194 Cal. App. 3d 955, 970-71, 240 Cal. Rptr. 50, 58 (4th Dist. 1987).

ing criminal acts from the discretionary function exception. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1518 (9th Cir. 1987) (alleged assault with deadly weapon and kidnapping and interrogation of protester not discretionary); *Liu v. Republic of China*, 642 F. Supp. 297, 305 (N.D. Cal. 1986) (killing United States citizen not a policy option available to foreign countries); *Letelier v. Republic of Chile*, 488 F. Supp. 655, 673 (D. D.C. 1980) (no discretion to order or aid in assassination).

It does not follow, however, that every act which may have criminal consequences falls outside the discretionary function exception. In *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918 (D.C. Cir. 1987), *modified*, 823 F.2d 606 (D.C. Cir. 1987), the court stated that "the legislative history counsels that the [tortious act] exception should be narrowly construed. . . ." *Id.* at 921.[10] In that case the court held that the exception covered the conversion of a building to serve as a chancery, although it arguably was a criminal violation of zoning regulations. In dictum the court observed:

> Moreover, it is hardly clear that, even if a criminal act were shown, it would automatically prevent designation of Peru's acts as discretionary. The cases on which appellant relies involve criminal acts of a rather different character and order. *See, e.g., Letelier*, 488 F. Supp. at 673 (involving "assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law"). We think it not unduly bold to conclude that violations, if any, of a zoning ordinance do not rise to the level of actions *malum in se*.

809 F.2d at 92 n.4.

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[10] The purpose of the discretionary function exception under the FTCA, like that under the FSIA, is to avoid interference with governmental policymaking. In applying the exception under the FSIA, however, the courts must consider the additional risk of interfering with foreign relations. As a result there is reason to construe the exclusion of criminal acts from the discretionary function exception more narrowly under the FSIA than under the FTCA, and hence give the discretionary function exception wider scope.

In *Joseph v. Office of Consulate General of Nigeria*, the Ninth Circuit distinguished *MacArthur* and declined to apply the discretionary function exception to the removal of property from and damage to leased premises. 830 F.2d 1018, 1026-27 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1077 (1988). The court said that, unlike the conversion of a building into a chancery, destruction of property cannot be considered as part of a policy decision, and that exercise of jurisdiction would not encroach on the foreign sovereign's ability to make policy decisions.

The decision to assist in the repatriation of a national is a decision of a different character and order than those held to be non-discretionary. A sovereign's issuance of travel document and funds to its citizens, and taking other actions in aid of its citizens' interests, are policy decisions, based on social, legal, and perhaps political considerations. Just as the decision to place bars on windows and install floodlights is part of a policy decision regarding the appearance and security of the Peruvian chancery, *see MacArthur Area Citizens Ass'n*, 809 F.2d at 922, the decision to assist the Risk children in returning to Norway implements Norway's policies concerning the protection of its citizens.

In addition, unlike the property destruction in *Joseph*, exercising jurisdiction in this case would encroach on Norway's ability to make police decisions about its nationals. That those decisions may conflict with decisions made by a California court does not render them any less entitled to the immunity under the FSIA.

Drawing the line between immune and non-immune acts violating the law of another state will rarely be an easy task. As the court in *MacArthur* said, the Court must look at the character and order of the conduct involved. 809 F.2d at 92 n.4. Customary standards of human conduct reject the implementation of policy by assault and battery. *See Gerritsen*, 819 F.2d at 1518.[11] But attaching the label of kidnapping to the conduct at issue is not sufficient to overcome the policy attributes of Norway's decision

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[11] *Gerritsen* relied on the distinction between planning and operational conduct in applying the discretionary function exception; this distinction was rejected by the Supreme Court in *Varig*, 467 U.S. at 813.

to aid its nationals in conformity with its own laws, regardless of the resulting conflict with California law.

Accordingly, the acts of Norway's officials are entitled to immunity under the FSIA.

2. Jurisdiction over the Mission

Risk alleges that the Mission is a citizen of Norway. (Complaint at ¶ 8.) On the face of the complaint, therefore, the Court has subject matter jurisdiction of the claim against the Mission, a foreign citizen, under 28 United States Code section 1332(a)(2). Because the Mission is not an "agency or instrumentality" of the Norwegian government, as defined by the FSIA,[12] *see* 28 U.S.C. § 1603(b), it is not entitled to claim sovereign immunity.

III. Act of State Doctrine

Defendants Norway and the Mission move to dismiss the claims against them under the act of state doctrine. Knudsen joins in this motion.

The traditional formulation of the act of state doctrine is that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) *quoted with approval in Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1963). The purpose of the doctrine is to "keep the judiciary from embroiling the courts and the country in the affairs of the foreign nation whose acts are challenged." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1360 (9th Cir. 1988) (*en banc*); *see Sabbatino*, 376 U.S. at 421-424 (act of state doctrine is not compelled by the constitution, by international law, or by the nature of sovereignty, but rather derives from judicial concern

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[12] The Mission's papers show that it is funded by a combination of private contributions, church collections, and government subsidies; that it is run by an independent board, not the Norwegian government, and that its primary function is to provide a "religious, cultural and hospitality retreat" for Norwegian seamen and travelers. (Affidavit of Helge Petterson at ¶¶ 2-3.)

with possible interference with the political branches' conduct of foreign affairs).

Even where jurisdiction exists under the FSIA, the act of state doctrine applies if the action would require the court to "question the legality of the sovereign acts of foreign states." *International Assn' of Machinists v. OPEC*, 649 F.2d 1354, 1359-60 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (dismissing case which would require passing on legality of OPEC's pricing scheme); *see also Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1113 n.2 (5th Cir. 1985) (because act of state doctrine is grounded in prudential considerations, rather than on the doctrine of sovereign immunity, passage of the FSIA does not supersede the act of state doctrine); *MOL, Inc. v. Peoples Republic of Bangladesh*, 572 F. Supp. 79 (D. Or. 1983), *aff'd on other grounds*, 736 F.2d 1326, *cert. denied*, 469 U.S. 1037 (1984).

Because the Court does not have jurisdiction over Norway, the application of the act of state doctrine to it need not be addressed. The Mission and Knudsen, however, also claim that because resolution of this action would require a determination by this Court of the legality of Norway's acts within the United States and Norway, the act of state doctrine requires that this action be dismissed.

The act of state doctrine may apply even where no foreign sovereign is a named defendant, if the validity of acts of that sovereign will be passed on by the court. *See, e.g., Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 75-78 (2d Cir.), *cert.denied*, 434 U.S. 984 (1977) (refusing to hear suit by independent oil producer against the major oil producers because it would require inquiry into Libya's motivation for nationalizing the plaintiff's assets); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 103-04 (C.D. Cal. 1971) (dismissal of action which would require decision on boundary dispute between two foreign sovereigns), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) (cited with approval in *Marcos*, slip op. at 15102). But, the doctrine applies only to acts of a foreign sovereign within its own territory. *See, e.g., Banco Nacionale de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (refusing to examine Cuban nationalization of holdings of American citizens

where there was no treaty or other unambiguous international agreement to supply legal principles); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (stating "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory," and refusing to hear an action by an American citizen seeking damages stemming from acts committed by Venezuelan general immediately after taking the government by force).

In addition, the act of state doctrine is limited to cases of "sovereign activity effectuating 'public' rather than private interests." *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

Thus, the Court may not inquire into the validity of sovereign actions of Norway, taken within Norway, which implicate Norway's public interest. It is clear that Norway's alleged acts in Norway implicate the public interest in the welfare of its citizens. The issue, then, is whether this action may proceed without necessitating an inquiry into those acts. *See Liu v. Republic of China*, 642 F. Supp. 297, 302-03 (N.D. Cal. 1986) (refusing to dismiss case because resolution of it need not necessarily involve inquiry into the national security and intelligence affairs of the Republic of China).

Risk alleges a conspiracy entered into in the United States, to remove and conceal the Risk children, and acts by Norway and others to further that conspiracy within the United States. Though Norway is alleged to have frustrated Larry Risk's 1984 attempts in Norway to locate his children, Complaint at ¶¶ 22-23, and to have agreed to assist Elisabeth Risk similarly if Larry Risk returns to Norway, Complaint at ¶ 23, it is not necessary to inquire into those acts to adjudicate the conspiracy claim against the Mission and Knudsen.

The Mission also argues that, because officials in Norway may have approved the actions of Norwegian officials within the United States, the act of state doctrine applies to bar consideration of the actions of Norway within the United States. The logical result of accepting this argument would be to hold that any

acts taken by Norwegian officials within the United States that are overseen by superiors in Norway would be immune. Such a holding would require drastic expansion of the act of state doctrine, beyond the traditional formulation of *Underhill*, and must be rejected.

Finally, the Mission argues that none of the cases focusing on the territorial nature of a sovereign's acts considered the application of the doctrine to consular acts alone committed within the United States. (Mission's Motion at 22 n.6.) In substance, it argues for an extension of national territory to include consulates abroad.

Even if Norway's consulate were treated as its territory, application of the act of state doctrine to the claims against the Mission and Knudsen would not be appropriate. The purpose of the act of state doctrine is to avoid interference with the political branches; where the issue presented is unlikely to affect foreign relations, there is little justification for refusing to hear the case. *Sabbatino*, 376 U.S. at 423; *Timberlane*, 549 F.2d at 607. *Compare International Assn' of Machinists* (named defendants were OPEC cartel members and challenged activity was OPEC pricing policy) *with Timberlane* (no need to dismiss case involving alleged conspiracy to force a lumber company out of business, where only involvement by foreign government was entry of court order in privately-initiated litigation, and foreign government not named as defendant). *See also Clayco Petroleum Corp.*, 712 F.2d 404, 406-07 (examining first whether sovereign acts implicated, then whether interference with the political branches' conduct of foreign policy would occur); *MOL, inc.*, 572 F. Supp. at 84-86 (determining first that acts within Bangladesh were sovereign acts, then analyzing these two factors).

Although Norway is named as a co-conspirator, having been dismissed it will not be directly involved in this action. Norway faces no judgment against it and a decision on the conspiracy claim will not affect its foreign relations.

On the record presently before the Court, therefore, the motion of Mission and Knudsen to dismiss must be denied.

IV. Statute of Limitations

Defendants contend that the limitations period has run on Larry Risk's claims. The parties agree that Risk's claims are governed by California Civil Procedure Code section 340.3, which provides that an action for personal injury must be brought within one year from the time the cause of action arises. Risk asserts three causes of action: for intentional infliction of emotional distress, for interference with his parental relationship with his children, and for conspiracy to interfere with this parental relationship.

The statute began to run on Risk's cause of action for intentional infliction of emotional distress once Risk's emotional distress reached the "severe" level. *Murphy v. Allstate Ins. Co.*, 83 Cal. App. 3d 38, 51, 147 Cal. Rptr. 565. 575 (4th Dist. 1978); *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1292 (9th Cir. 1987). Risk has alleged "severe mental, emotional and physical distress and suffering" beginning in July 1984. (Complaint ¶ 34.) Ordinarily, where conduct complained of is continuing, the time at which "the defendant's conduct has become sufficiently outrageous and the plaintiff's emotional distress sufficiently severe for the plaintiff to state a cause of action will be questions of fact." *Murphy*, 83 Cal. App. 3d at 51. However, the act of taking Risk's children and continuing to keep them is not a course of conduct that only becomes outrageous over time, and Risk himself has alleged that the taking of the children inflicted "severe" emotional distress beginning in July 1984. This claim therefore is barred.

Risk's claims for interference with, and for conspiracy to interfere with, the parental relationship are based upon California Civil Code section 49, which provides that "[t]he rights of personal relations forbid . . . [t]he abduction or enticement of a child from a parent." This section has been applied to bar both the unlawful taking of a minor child from custody and the unlawful withholding of the minor child from custody. *Surina v. Lucey*, 168 Cal. App. 3d 539, 542, 214 Cal. Rptr. 509, 511 (2d Dist. 1985).

Generally, tort actions accrue when the wrongs alleged were committed and the resulting damages incurred. The tort of interfering with the parental relationship, however, is a continuing tort because it encompasses the withholding of a child from his or her parent's custody. *See Surina v. Lucey*, 168 Cal. App. 3d at 542, 214 Cal. Rptr. at 511. Therefore, the statute of limitations has not run on this claim. *Cf. Leonhard v. United States*, 633 F.2d 599, 613 (2d Cir. 1980) (applying principle that, at common law, claim for redress of continuing wrong does not accrue until date of last wrongful act to *Bivens* action based on removal of children from father).

Similarly, the statute of limitations does not begin to run on a conspiracy claim until the last overt act has been committed.[13] *Molko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092, 252 Cal. Rptr. 142, *modified*, 47 Cal. 3d 470a (1988); *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 786, 157 Cal. Rptr. 392, 400 (1979). For an act to be an overt act delaying the commencement of the limitations period, it must be performed in furtherance of the conspiracy. *See Livett v. F.C. Financial Assoc.*, 124 Cal. App. 3d 413, 419-21, 177 Cal. Rptr. 411, 414-15 (4th Dist. 1981). Here, Risk has alleged a conspiracy to "harbor and conceal" the Risk children. Risk contends that Elisabeth Risk's retention of the children in Norway are acts in furtherance of that conspiracy. Accordingly, the statute of limitations on this claim has not run.

V. Motion to Dismiss Knudsen

Knudsen moves to dismiss the claims against him on the ground that the allegations against him are insufficient to state a claim. Knudsen is named in the causes of action for interference with Larry Risk's parental relationship with his children, for

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[13] Under California law, a civil conspiracy is not itself a tort. *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 787 n.4, 157 Cal. Rptr. 392, 400 n.4 (1979). Liability is based on the underlying tort committed in furtherance of the conspiracy. *Id.* The application statute of limitations is the statute of limitations for the underlying tort. *See Maheu v. CBS, Inc.*, 201 Cal. App. 3d 662, 247 Cal. Rptr. 304, 310 (2d Dist. 1988); *Bedolla v. Logan & Frazer*, 52 Cal. App. 3d 118, 136, 125 Cal. Rptr. 59, 73 (1st Dist. 1975).

intentional infliction of emotional distress, and for conspiracy to remove the children from California. Larry Risk does not oppose the dismissal of the claims for interference with his parental relationship with his children and for intentional infliction of emotional distress.

The second cause of action alleges that Knudsen participated in an ongoing conspiracy to "harbor and conceal" the children from Risk, Complaint at ¶ 30, in conscious disregard of Risk's custody rights, Complaint at ¶ 32. Risk also alleges that Knudsen 'deliberately denied" knowing where the Risk children were, when in fact Knudsen knew that the Chief of Personnel of the Mission had traveled with Elisabeth Risk and the children out of California. (Complaint at ¶ 20.) A tortfeasor is liable, under a conspiracy theory, for all damages resulting to the plaintiff from acts done in furtherance of the shared objective of the conspiracy. 5 B. Witkin, *Summary of California Law*, Torts § 46 (9th ed. 1988). These allegations suffice to permit Risk to prove facts at trial making Knudsen liable.

VI. Conclusion

The claims on behalf of the Risk children are dismissed for lack of diversity jurisdiction. Risk's claims against Norway are dismissed for lack of subject matter jurisdiction under the FSIA. Risk's claim for intentional infliction of emotional distress is dismissed on the ground that it is barred by the statute of limitations. His claims against Knudsen for interference with the parental relationship and for intentional infliction of emotional distress are also dismissed. In all other respects, defendants' motions to dismiss are denied.

The only claims remaining are those against the Mission for conspiracy and interference with the parental relationship and the claim against Knudsen for conspiracy.

The Court will hold a status conference on April 14, 1989, at 10 a.m. to consider further proceedings.

IT IS SO ORDERED.

DATED: March 2, 1989

WILLIAM W. SCHWARZER
United States District Judge